CLERK'S COPY.

Petition not printed

No 326 denied

TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1942

No. 325

JEROME PARKER JEROME, PETITIONER

vs.

THE UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR CERTIORARI FILED AUGUST 21, 1942
CERTIORARI GRANTED OCTOBER 12, 1942

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1942

No. 325

JEROME PARKER JEROME, PETITIONER

vs.

THE UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

INDEX

	Original	Print
Proceedings in U. S. C. C. A., Second Circuit	1	1
Opinion, Clark, J	1	1
Opinion, Frank, J. (concurring in part and dissenting in part)	13	9
Order granting motion for leave to proceed in forma pauperis	26	17
Order allowing certiorari	27	17

489621—42——1

IN UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

Nos. 340–341—October Term, 1941

(Argued June 16, 1942—Decided July 17, 1942)

UNITED STATES OF AMERICA, APPELLEE

v.

JEROME PARKER JEROME, APPELLANT

Appeal from the District Court of the United States for the District of Vermont

Jerome Parker Jerome was separately convicted of violating 12 U. S. C. A. § 588b and 18 U. S. C. A. § 753h, and he appeals from each conviction. Both convictions affirmed.

Before CHASE, CLARK and FRANK, Circuit Judges.

Louis Lisman, of Burlington, Vt. (George L. Agel, of Burlington, Vt., on the brief), for appellant. Joseph A. McNamara, U. S. Atty., of Burlington, Vt. (Bernard J. Leddy, Asst. U. S. Atty., of Burlington, Vt., on the brief), for appellee.

Opinion

2 CLARK, Circuit Judge:

These are appeals by the defendant from two judgments of conviction and imprisonment rendered against him upon successive jury verdicts based upon two separate indictments. The first indictment, based upon 28 U. S. C. A. § 588b, charged that defendant entered a national bank, a member of the Federal Reserve System, with intent to commit in such bank a felony, to wit, that of knowingly and with intent to defraud the bank uttering and publishing as true to the bank a promissory note upon which, as he knew, there was a forged endorsement. The second, based upon 18 U. S. C. A. § 753h, charged that, while in custody of the United States marshal for the District of Vermont under a warrant for the above charge, defendant escaped from the marshal's custody. In each case the issue is the appropriate construction of the cited federal statute.

On July 14, 1941, defendant, then a captain in the United States Army stationed at Fort Ethan Allen, Vermont, entered a national bank in Burlington for the purpose of borrowing $500. He was told that before the loan could be made he would have to procure the endorsement of another army officer of at least equal rank,

and a note was prepared for his use. Later in the same day he returned waving the note in the air and saying that he had done better, for he had "a major's signature." The note, bearing the signatures of defendant and of Henry S. Derby, Major, 71st Field Artillery Brigade, was discounted by the bank. It has never been paid, except that a small credit in the defendant's account at the bank was applied on it at the due date. At the trial Major Derby testified that, while he had been at Fort Ethan Allen just prior to July 14 and returned there shortly later, yet actually on that date he was at Fort Sill, Oklahoma; that he never signed the note or authorized the used of his name; that he first knew
3 that his name appeared on the note when the bank notified him of its non-payment on the due date; and also that while he was at the Fort his signature was readily accessible to anyone there. These were the facts upon which the first conviction was based. The second conviction was based on proof that, being apprehended in Reno, Nebraska, and delivered to the marshal for the District of Vermont on proper process on October 23, 1941, he escaped on November 15, 1941, from the Rutland County Jail, to which he had been committed by the marshal for safekeeping. He was later apprehended in San Antonio, Texas.

I. That part of 12 U. S. C. A. § 588b which is here involved was enacted in 1937 as an addition to the Bank-Robbery Statute of 1934. It reads: "Whoever shall enter or attempt to enter any bank, or any building used in whole or in part as a bank, with intent to commit in such bank or building, or part thereof, so used, any felony or larceny, shall be fined not more than $5,000 or imprisoned not more than twenty years, or both." Sec. 8485 of the Public Laws of the State of Vermont, read in connection with Sec. 8484, provides that a person who utters and publishes as true a forged promissory note, knowing it to be forged, with intent to injure or defraud a person, shall be subject to a fine and to imprisonment in the state prison for not more than ten years, a penalty which under Sec. 8750 makes the offense a felony. The court below has held, in accordance with the majority view in the Tenth Circuit Hudspeth v. Melville, 127 F. 2d 373; Hudspeth v. Tornello, 128 F. 2d 172, that the word "felony" in the federal statute quoted includes a state offense such as that here in question. Although some contention is made of a lack of evidence to show knowledge on defendant's part, that claim is obviously unfounded; and if the court's view of the statute is correct, the evidence clearly sustained the conviction.

4 Defendant, following the dissenting opinion in the Hudspeth cases, argues that the word "felony" does not apply to the state offense here relied on. His two positions, believed to be somewhat conflicting, as pointed out below, are that it means either

a felony as "defined" in the Criminal Code or one affecting the currency or national banks. This "definition" is more accurately a classification of crimes, along the usual lines of distinction between felonies and misdemeanors, found in 18 U. S. C. A. § 541: "All offenses which may be punished by death or imprisonment for a term exceeding one year, shall be deemed felonies. All other offenses shall be deemed misdemeanors."

Prior to 1934, while it was an offense under federal law for any officer, director, agent, or employee of a national bank to embezzle or extract funds from the bank, 12 U. S. C. A. § 592, yet robbery or theft from it by others than such employees was punishable only under state laws. Since the states seemed to be increasingly unable to protect themselves against gangs of interstate bank robbers, Attorney General Cummings in 1934, as one of a series of extensive federal criminal statutes then proposed by him[1]—his so-called twelve-point program of federal crime control—recommended the legislation which was passed as the Bank-Robbery Statute. 12 U. S. C. A. §§ 588a–d. In its first section, now § 588a, this statute defined the term "bank"; by amendment of 1935, this now includes not only members of the Federal Reserve System, but all insured banks as defined in 12 U. S. C. A. § 264 (c). In its second section, § 588b, as originally passed it provided in subdivision (a) for punishment of anyone who, "by force and violence, or by putting in fear, feloniously takes, or feloniously attempts to take, from the person or presence of another any property or money or any other thing of value belonging to, or in the care, custody, control, management, or possession of, any bank." That is, as its title discloses, it defined the offense of "robbery of bank." The amendment of 1937 added to this subdivision the provision quoted above, as well as other provisions referred to below. Subdivision (b) defined the offense of "assault in committing or attempting to commit bank robbery." A third section, now § 588c, applied to "killing or kidnapping as incident to robbery," while § 588d, a fourth section, provided that "jurisdiction over any offense defined by sections 588b and 588c of this title shall not be reserved exclusively to courts of the United States."[2]

---

[1] Ann. Rep. Atty. Gen. U. S., 1933, p. 1, 1934, pp. 1, 61–64, 1935, pp. 1, 56; Proceedings Atty. Gen.'s Conf. on Crime, 1934, 302, 352; Chamberlain, Federal Criminal Statutes, 1934, 20 A. B. A. J. 501; 48 Harv. L. Rev. 489; 1 Law & Contemp. Prob. 39, 448; 21 Va. L. Rev. 568, 572.

[2] As this legislation was originally proposed, it also defined two other offenses: one, that of carrying away property of the bank, which may be compared with the amendment of 1940 adding § 588c, referred to below; the other, the offense of breaking into or attempting to break into any building or part thereof used as a bank with intent to commit any offense defined by that act or any felony under federal or state law. Though the Senate passed the bill, the House struck out these two provisions, desiring to limit the legislation more closely to offenses against banks. 1 Law & Contemp. Prob. 448. Both houses voted to adhere to their positions, and it took a committee of conference of the two houses to induce the Senate to yield. 78 Cong. Rec. 8132, 8778, 8855–7. It should be noted that when the Attorney General came to renew his proposal in 1937, he made use of the same idea and, in part, of similar language, but he broadened the proposal to include "any . . . depredation."

The 1937 amendment also came about through recommendation of Attorney General Cummings, who under date of March 17, 1937, wrote Speaker Bankhead the reasons for amending the bank-robbery statute to "include larceny and burglary" and set forth a draft of a bill. The bill was introduced by Representative Sumners of Texas and was promptly recommended favorably by the House Judiciary Committee with a report, H. R. Rep. No
6 732, 75th Cong., 1st Sess., April 30, 1937, which quoted, and agreed with, the Attorney General's letter. One member made an objection to the possible severity of the bill, as pointed out below, 81 Cong. Rec. 4656; whereupon the Committee suggested an amendment, and the amended bill was passed by the House, June 7, 1937. 81 Cong. Rec. 5376, 5377. In the Senate the Committee on the Judiciary promptly reported accepting and quoting the House Committee's Report, including the Attorney General's letter, Sen. Rep. No. 1259, 75th Cong., 1st Sess.; and the amended bill was soon passed without dissenting voice and signed by the President, August 24, 1937.

The scope of the bill, as proposed by the Attorney General and as considered in the House, shows its purpose and, as we believe, clearly demonstrates that it was intended to include common-law or state felonies. The Attorney General's letter—quoted in full at page 376 of 127 F. 2d—states that "the fact that the statute is limited to robbery and does not include larceny and burglary has led to some incongruous results." It continues with the "striking instance" of a man who was walking out of a bank with $11,000 of the bank's funds on his person, possession of which had been gained without force during a momentary absence of a bank employee, and federal prosecution could not be had. It further states that the enclosed bill, drafted in the Department, proposed to amend the statute "so as to include within its prohibitions, the crimes of burglary and larceny of a bank covered by its provisions."

The bill as submitted by the Attorney General contained the words "any larceny or other depredation" where the words "any felony or larceny" now appear. This obviously all-inclusive language was objected to on the floor of the House because it would put simple larceny on the same plane as robbery and breaking and entering in an attempt to commit larceny, and that
7 "if a man should go into a bank to make a deposit and pick up a pencil and walk out with it, he would be on the same plane, according to this bill, as a man who deliberately broke in during the nighttime and committed larceny." The objecting Congressman also pointed out that "breaking and entering is a crime in and of itself." 81 Cong. Rec. 4656. This led to the Committee's amendment of the bill to add "felony" before "lar-

ceny" and strike out "other depredation." [2] So far, however, from changing the general broad scope of the bill except for this one item of eliminating the undoubted severity of punishment for minor matters, the bill throughout remained one "to amend the bank-robbery statute to include burglary and larceny," and was finally passed with this title. 50 Stat. 749.

It should be noted that if defendant's contention is correct, one of the two crimes so stressed throughout all these proceedings, to wit, burglary, is in no manner covered by the result. We have seen no answer to this clear fact that the reiterated statement of their intent by the proponents of the measure will be partially defeated if the broad and general language of the statute is to be restrictively construed. It will then be dangerous for federal officers to seize a man while he is breaking into a bank; they must wait and see what his ultimate plans are.

Moreover, there are other considerations which point away from so narrow a construction of the legislation. Thus, the whole basis of this statute in its original and its amended form is that of building upon state or common-law offenses—at least robbery originally,[4] and later larceny also, as shown by the express language of the act, irrespective of the Attorney General's intent. Furthermore, the use of the word "larceny" is highly significant.

8 No attempt is made here to define this term, and we must go to state and common-law authorities for its meaning. The fact that one term of a statute has such a common-law or state significance would naturally lead to the conclusion that another term used in the same phrase has a like significance.

It will not do to say that larceny has not this broad significance, but refers only to the crime of stealing or purloining property or money from a bank, which is defined in other provisions of the Act of 1937. For the choice of this ancient and honorable common-law term in preferance to either a simple extension of the crimes later defined to attempts or a simple reference to any offense defined by this act points to deliberation in selection of all-inclusive terms.[5] "Larceny was, of course, not identical

[2] The other change in the bill is stated in note 5, infra.

[4] See 1 Law & Contemp. Prob. 448; 21 Va. L. Rev. 568, 572.

[5] This is borne out by the legislative history as to this part of the 1937 Act. Originally the provision recommended by the Attorney General did not contain a statement of the penalty, but continued after the word "depredation"; "or whoever shall take or carry away, with intent to steal or purloin, any property or money or any other thing of value belonging to, or in the care, custody, control, management, or possession of any bank, shall be fined not more than $5,000 or imprisoned not more than twenty years, or both." Construing larceny under the circumstances, particularly in view of the word "depredation," as referring to the offense stated in the latter part of the same sentence would have been, indeed, a forced construction. The form of this statute was changed as a part of the Committee's amendments to meet the objection of its undue severity. 81 Cong. Rec. 5376, 5377. The change consisted in adding the statement of this penalty after the word "larceny," thus making it applicable to this part of the statute, as well as the original bank-robbery provision, and in dividing the second offense in two parts with different penalties, thus: "or whoever shall take and carry away, with intent to steal or purloin, any property or money or any other thing of value exceeding $50 belonging to, or in the care, custody,

with "felony," since it also included petty thefts. But its use here when other phrases would have been apt, if lesser and more precisely defined crimes alone were in view, is most persuasive of a legislative intent to include all state offenses.* That jurisdiction over these offenses was not reserved exclusively to the federal courts points towards this same conclusion.

On the other hand, if the statute is to be given the limited effect claimed by defendant, its scope, as to felonies, is comparatively slight, and the legislators might well have confined it to robbery and larceny only, so far as its practical usefulness in protecting national banks is concerned. It is said, however, to have some coverage, particularly as it applies to "attempts" to enter with the appropriate felonious intent. But that seems more a theoretical than a practical answer. It is a usual practice, with respect to federal crimes, for the statute to include an attempt as a defined offense when that seems appropriate; one might even deduce a federal policy as to attempts against general legislation, and in favor of specific definition with reference to specific crimes. Thus, by the well-known statute of 1872, 18 U. S. C. A. § 563, a defendant may be found guilty of an attempt to commit the offense with which he is charged "if such attempt be itself a separate offense." At any rate, the result is that federal legislation on crimes is already rather complete as to attempts where they are important, and this backhanded way of reaching attempts seems quite unnecessary and rather useless as an aid to federal officers in their war on organized crime. That is, a potentially effective statute, applying to cases such as the present where federal prosecution ought to be as much available as in any case of 880 theft, would be rendered comparatively nugatory. Such a result seems even less likely to have been intended when we consider that the act was again amended in 1940 to make it a crime to "receive, possess, conceal, store, barter, sell, or dispose" of any property or money, knowing it to have been taken from a bank in violation of the earlier subdivision of the section. 54 Stat. 695, adding (c) to § 588b. The seemingly broad and all-inclusive terms of this 1940 amendment would then also turn out in fact to be sadly limited by the construction given the earlier provision.

---

control, management, or possession of any bank, shall be fined not more than $5,000 or imprisoned not more than ten years, or both; or whoever shall take and carry away, with intent to steal or purloin, any property or money or any other thing of value not exceeding $100 belonging to, or in the care, custody, control, management, or possession of any bank, shall be fined not more than $1,000 or imprisoned not more than one year, or both." 12 U. S. C. A. § 588b.

*How far "stealing or purloining" is actually identical with common law or state larceny cannot be shortly answered in view of the various fine shades of meaning in all those various terms (see 32 Am. Jur. 885 for interesting examples; and compare Van Valkinburg v. American Eagle Fire Ins. Co., 270 N. Y. 393, 401 N. E. 482, 28 A. L. R. 1115); perhaps defendant was guilty of an intent to "purloin" funds of the bank. Moreover, "larceny" by itself does not suggest a limitation to stealing only from a bank.

The strongest, perhaps the only, argument against these views is that they give too wide a sweep to the statute. But, as we have seen, the proponents of the measure contemplated a definite broadening of the earlier provisions. It is urged, however, that the statute, as thus construed, might cover in all sorts of state offenses committed in a banking house, but not actually directed against the bank. It would seem, however, that this is not an objection which the legislative body would consider at all conclusive. Suppose a shooting to occur in a bank; would it not seem desirable to have this a matter of federal investigation, even if it did not immediately appear that this had some direct connection with the bank? And in practice, as distinguished from theory, the objection seems rather unreal, for a bank lobby is not the appropriate place to stage all miscellaneous crimes; and those there committed actually unconnected with the operation of the bank are not likely to be numerous. Under the circumstances a legislative draftsman might well prefer to avoid the pitfalls of specification and limitation by use of a generality of expression which, indeed, has been somewhat the feature of recent legislation on crime, particularly that sponsored by
11 Attorney General Cummings.[1] See, for example, the National Motor Vehicle Theft Act, 18 U. S. C. A. § 408; the National Stolen Property Act, 18 U. S. C. A. § 413 et seq.; the National Cattle Theft Act, 18 U. S. C. A. §§ 419a–d; and the Fugitive Felon Act, 18 U. S. C. A. § 408e—all built on the basis of state crimes.

There are other difficulties in the more limited construction of the statute, even of determining what the more limited meaning is. As suggested above, two alternatives are offered—a profusion which perhaps itself suggests doubt of each. If the word applies to all federal felonies, the objection just discussed of wide character of offenses subject to prosecution and their lack of direct connection with the banking business is just as appropriate. Even more, some of the results would border on the ridiculous; while the misdeed here in issue, resulting in direct and substantial loss to the bank, would not be covered, yet entry with intent to violate the Mann Act or the narcotic laws would be. The so-called definition of felonies in 18 U. S. C. A. § 541 does not require such a result. The classification of the statute may be applied here as stated, and yet the offense committed by this defendant may be fully and correctly embodied in the statute. Sec. 541 does not define and exclude; it says simply what, for purpose of federal laws generally, shall be labeled a felony. If a federal crime is here stated (and § 541 does not purport to shed light on that matter),

[1] See note 1, supra.

then it is clear that it is a felony under § 541 because of the nature of the punishment.*

12 If, however, we go further and attempt to limit the statutory meaning to felonies against national banks or the currency, we have an idea which well might have been accepted by the legislators but for which there seems no real basis in the language of the statute, or its background, to justify. It seems like a definition tailored to fit the cloth, after the cloth has been decided upon. Why, for example, should we not fashion it to read "federal and state felonies against national banks" and thus include this case, rather than the even more stilted "federal felonies only and only against national banks"?

We conclude, therefore, that defendant was properly convicted of the first crime with which he was charged.

II. Little need be said of defendant's conviction of escape from the Rutland County Jail. The applicable statute, 18 U. S. C. A. § 753h, passed in 1930 and amended in 1935, so far as here material reads: "Any person committed to the custody of the Attorney General or his authorized representative, or who is confined in any penal or correctional institution pursuant to the direction of the Attorney General, or who is in custody by virtue of any process issued under the laws of the United States by any court, judge, or commissioner, * * * who escapes * * * from such custody or institution, shall be guilty of an offense." Defendant concedes that if—as we have found—he was properly charged with an offense against the United States, then his escape is a violation of this statute. But even had our decision been otherwise on the first issue, this statute clearly is intended to reach anyone who is held by virtue of any proper and legal process. In Aderhold v. Soileau, 5 Cir., 67 F. 2d 259, it was held that the statute was violated by an escape from a reformatory by one who was serving a sentence so uncertain as to be void. It was also held that nonetheless a prisoner was not entitled to take the law into his own
13 hands, but should be limited to other means of testing the question. We think the same rule is appropriate here, just as conviction under a statute later found to be unconstitutional does not justify an escape. See Kelley v. Meyers, 124 Or. 322, 263 P. 903, 56 A. L. R. 661, 669–671.

The judgments of conviction are affirmed.

* Even if § 541 be pressed to greater significance, there is another meaning which seems preferable to that urged by defendant, namely, that the state offense must rise to the dignity of a felony as it were defined before it is within the statute. Thus, if a state statute defined a felony as including one for which imprisonment of six months was provided, there might be a question whether § 541 would not control, in spite of the state statute, to exclude an offense punishable only by six months' imprisonment.

—Opinion

FRANK, Circuit Judge (concurring in part and dissenting in part):

I agree, of course, that appellant was properly convicted under U. S. C. A., Title 18, § 753h, regardless of the validity of his conviction under U. S. C. A. Title 12 § 588b.

I cannot, however, agree that he was properly convicted under U. S. C. A. Title 12, § 588b, i. e., that entering a bank with intent to commit a forgery is a federal crime. The majority's interpretation of that section is not necessary to accomplish the Congressional purpose (indeed it ignores that purpose as shown by the legislative history); calls for federal enforcement of a huge number of state criminal laws, imported by mere implication into the federal system, with respect to more than thirteen thousand banks; leads to highly awkward consequences; and involves the unusual method of broadening a penal statute by latitudinarian construction. To make clear my reasons for dissenting, it is desirable that I first restate some of the facts relating to the history of that section.

1. In 1934, 12 U. S. C. A. § 588b was first enacted. It provided, among other things—subdivision (a)—for federal punishment of one who "by force and violence, or by putting in fear, feloniously takes, or feloniously attempts to take, from the person or presence of another, any property or money or any other thing of 44 value belonging to, or in the care, custody, control, management, or possession of, any bank." In 1934, the section was amended to include in the definition of bank not only national banks but all banks insured under Title 12 U. S. C. A. 264c; it thus covers not only national banks but numerous state banks—in all, as of the end of last year, 13,427 banks.

This section was further amended in 1937. The legislative history (discussed briefly below) shows that the Congressional purpose in adopting these 1937 amendments was to add, to the existing federal crime of bank robbery, (a) the federal crimes of felonious stealing from and petit larceny from a bank; (b) the federal crime of burglary of a bank; and (c) the federal crime of peaceably entering a bank with intent thus to steal bank property. These objectives were achieved by the following 1937 amendments to § 588b:

(a) Taking or carrying away, with intent to steal or purloin, property of or in possession of a bank was then made a new federal crime.[1] If the value of the property stolen is more than $50, the punishment includes imprisonment for not more than ten years;

[1] The majority opinion relegates to a footnote this important part of the 1937 amendments.

such stealing is made a federal felony, as felony is defined in 18 U. S. C. A. § 541, i. e., an offense which may be punished by imprisonment for more than a year.[2] If the value is $50 or less, the punishment includes imprisonment, but not for more than a year; such stealing is thus made a misdemeanor, as that term is defined in 18 U. S. C. A. § 541. (It should be noted that stealing, when it is less than a felony, is commonly called petit larceny. See, e. g., 36 C. J. 800.)

15 (b) The other chief change made in 1937 in § 588b was the inclusion of a sentence making it a federal crime to "enter or attempt to enter any bank * * * with intent to commit in such bank * * * any felony or larceny * * *"

These two changes nicely correlate: The first change made stealing from a bank either a federal felony or federal petit larceny. The second made it a federal crime to enter or attempt to enter a bank with intent to commit such a federal felony or federal larceny. And such an entry was constituted a federal crime whether peaceably made or by breaking in; it thus includes burglary of a bank, i. e., breaking and entering with a felonious intent.

That it covers more than "burglary" obviously does not prevent it from including "burglary." And that it includes breaking and entering with less than felonious intent—i. e., with intent to commit petit larceny—again does not prevent it from covering what has been traditionally known as "burglary," i. e., breaking and entering with felonious intent.

2. The legislative history shows that, to achieve the Congressional purpose in enacting these amendments, it is not at all necessary to accept the interpretation adopted in the majority opinion, i. e., to define "felony" as including all felonies under not only federal but state law; it is amply sufficient to hold that "felony," in the phrase, "enter or attempt to enter any bank * * * with intent to commit in such bank * * * any felony or larceny * * *," means (a) any federal felony (b) affecting a bank covered by § 588b:

(a) The original Act, enacted in 1934, grew out of proposals of the Attorney General. As stated in a footnote in the majority opinion, his draft of the statute, then proposed, included the offense of breaking into a bank with intent to commit any
16 felony under federal or state law. Congress rejected that proposal when it passed § 588b in 1934. Significantly, when, in 1937, the Attorney General proposed amendments to 588b, he did not again suggest any reference to "state law"—

[2] That section reads: "All offenses which may be punished by death or imprisonment for a term exceeding one year shall be deemed felonies. All other offenses shall be deemed misdemeanors. * * *"

obvious verbiage if the purpose was to include state-law felonies. It is, then, apparent that Congress knew the apt words to accomplish that purpose. Indeed, in 18 U. S. C. A. § 468, dealing with crimes on lands over which the federal government has jurisdiction but within the territorial limits of any state, Congress explicitly stated that if anyone does an act which is not made penal by federal statute, but where such act "if committed * * * within the jurisdiction of the State * * * in which such place is situated * * * would be penal," he "shall be deemed guilty of a like offense * * *." There is, therefore, pertinent here the familiar rule that a statute is not, by interpretation, to be given an extended meaning when, had the legislature intended that meaning, it would have been "so easy to say so."[3]

(b) Without referring in any way to "state law," the Attorney General, in his letter to the Chairman of the Senate Judiciary Committee, proposing amendments in 1937, said that his purpose was to add to § 588b "the crimes of burglary and larceny of a bank." [It will be observed that he said "of" not "in" a bank.] He also said that the fact that the statute "is limited to robbery, and does not include larceny and burglary, has led to some incongruous results." He gave, as a "striking instance," a case where a man had walked out of a bank with $11,000 of the bank's funds, of which he had gained possession during a momentary absence of one of the bank employees, without displaying any force or violence and without putting anyone in fear; since those were necessary elements under the statute as it then stood, the Attorney General pointed out that the man could not be prosecuted "under any federal statute." Now it is clear that, without any necessity of construing "felony" to mean state-law felonies, bank-burglary and bank-larceny and the specific kind of case cited by the Attorney General are all fully covered by the 1937 amendments.

17

(c) It is to be observed that nowhere did the Attorney General say or even imply that he wanted the statute amended so as to include (1) crimes not affecting banks; or (2) any federal crimes in addition to burglary and larceny; or (3) all state felonies or larcenies. He did not so much as mention forgery. And still less did he suggest that he desired to convert into a federal crime the

---

[3] E. g., Farrington v. Tennessee, 95 U. S. 679, 689; Union National Bank v. Matthews, 98 U. S. 621, 627; Baltimore & P. R. R. Co. v. Grant, 98 U. S. 398, 403; Vicksburg S. & P. R. R. Co. v. Dennis, 116 U. S. 665, 670; United States v. Chase, 135 U. S. 255, 259; United States v. Koch, 40 Fed. 250, 252; Harrington v. Herrick, 64 F. 468, 471 (C. C. A. 9); Central Real Estate Co. v. Commissioner, 47 F. (2d) 1036 (C. C. A. 5); Commissioner v. Beck, F. (2d), (C. C. A. 2, June 24, 1942).

True, in the National Stolen Property Act (18 U. S. C. A. § 413ff) and the National Motor Vehicle Theft Act (18 U. S. A. § 408) and certain other Acts, the words "steal" and the like are used and must sometimes be given their meaning under state laws; but such interpretation of those words is, in those Acts, essential, else those words in those Acts would be functionless. But, as shown above, the words "felony" and "larceny," in 12 U. S. C. A. § 588b are meaningful and have a function without importing state felonies and larcenies into that Act.

entry into or attempt to enter a bank with intent to commit a forgery—while omitting from the category of federal crimes the actual commission of such a forgery.

The title of the 1937 Act containing the amendments of § 588b is "To amend the bank-robbery statute to include burglary and larceny." That objective—which surely indicates no purpose to include entering or attempting to enter a bank with intent to commit forgery or all state-law felonies—is now fully covered by the section, thus amended, without lugging in state-law felonies.

18 (d) This also is significant: § 2 of the statute proposed by the Attorney General in 1934, and introduced as a Senate bill, made it a federal felony to take money from a bank with its consent when such consent was induced by fraud. Representative Hatton Sumners, Chairman of the House Judiciary Committee, "sought throughout the session to confine extensions of federal power to situations where the need to supplement state and local enforcing agencies had become imperative"; and it was "evident that to have brought all cases in which money is taken fraudulently from banks within the scope of federal criminal jurisdiction would have placed a heavy enforcement burden upon the federal government."[4] As a result of Representative Sumners' opposition, the fraud provision was eliminated. It is important to note, then, that the 1937 amendments sponsored by the Attorney General were included in a bill introduced in the House of Representatives by Representative Sumners whose objections in 1934 had led to the elision of the fraud provision. It is highly unlikely that, in 1937, without explanation, he abandoned those objections and urged legislation which not only covered the crime of fraud on a bank (for, in most states, that is a felony) but went much further. And it is not to be believed that the Attorney General so intended, for, if so, his letter explaining those amendments was most misleading, as it stressed bank "larceny and felony" and contained nothing indicating a purpose to reintroduce the fraud provision. Yet the majority's interpretation of those amendments has the effect of including it[5]—and does far more besides by way of placing a heavy enforcement burden on the federal government to prosecute persons for entering or attempting to enter any one of

19 13,427 banks with intent to commit any act which is a felony or larceny under the law of the State in which such bank is located. (In effect, it makes each one of the 13,427 banks covered by the Act, to a large extent, the equivalent of a territory within the jurisdiction of the United States, as if included within

[4] 1 Law and Contemporary Problems (1934) 445, 448–449.
[5] For, under many state laws obtaining money by fraud is a felony.

Title 18, Chapter 11 (§ 451 et seq.), which brings all state laws into play as to such a territory.)

3. Not only is the majority's definition of "felony" not needed to achieve the purposes of the 1937 amendments, but that definition leads to awkward and, in some instances, irrational results:

(a) An outstanding awkwardness in so defining "felony" is illustrated by the indictment and conviction of appellant: [6] He was not charged with committing a forgery, but with entering a bank with intent to commit a forgery in a national bank. In truth, no one would think of trying to procure an indictment and conviction in the federal courts for forgery victimizing such a bank—for the very good reason that such a forgery is patently not a federal crime. Under 12 U. S. C. A. 596, it is a federal crime to make a false statement to procure loans, etc. from the 12 Federal Reserve Banks and their 24 branches. But neither that nor any other federal statute covers forgeries vis a vis national banks or any other of the 13,427 banks covered by § 588b. It is obvious then that, if the majority opinion correctly construes 12 U. S. C. A. § 588b, a man who enters any of those 13,427 banks with innocent intentions and then, when in the bank, commits a forgery, is guilty of no federal crime, but he is thus guilty if he enters or attempts to enter any such bank with intent to commit the state crime of forgery—even if that intent is frustrated. He is, moreover, guilty of no federal crime if, while not in the bank building but in the
20 office of the bank's lawyer (two blocks away), he forges a note, delivers it to the lawyer as the bank's representative, and procures money thereby. The curious consequence of the majority's interpretation is that the minor offense is a federal crime and the major offense is not.

(b) The majority opinion asserts—mistakenly, as I think I have shown—that it is necessary to interpret "felony" as including state-law felony, if § 588b is to carry out the Congressional purpose of making bank burglary a federal crime. But the majority interpretation does not achieve that purpose: Under that interpretation, no one can properly be federally indicted for a bank burglary, but only for entering or attempting to enter a bank with the intent to commit burglary; to be sure, the practical result is the same, but the necessary circumlocutory wording of an indictment for burglary under the majority's interpretation goes to show that Congress could not have intended to punish burglary in any such roundabout way.

[6] The indictment charged that appellant "did unlawfully, wilfully and feloniously enter The Howard National Bank & Trust Company, said bank being a National Banking Institution and a member of the Federal Reserve System, with intent to commit in said bank a felony, to wit, knowingly, wilfully and feloniously to utter and publish to said bank, as true, a promissory note in the amount of Five Hundred Dollars ($500.) with the endorsement thereon of 'Henry S. Derby,' which endorsement was forged. . . ."

(c) The majority's interpretation leads to even more surprising results: The most serious state felony is, of course, murder. If a man enters one of the 13,427 banks with innocent intentions but, while in that bank, becomes engaged in a quarrel and shoots and kills another man in no way connected with the bank, no federal crime has occurred. But, according to the majority's interpretation of § 588b, if a man attempts to enter such a bank with intent to murder such a person, and is prevented from doing so, he is guilty of a federal crime.

21 (d) The awkwardness of the majority's interpretation becomes more marked when one considers the numerous acts which are felonies under state laws—rape, and adultery, for instance. [The majority opinion itself indicates that it is laughable to suppose that Congress meant to include in § 588b the entry into a bank with intent to violate the federal White Slave Act (Title 18, U. S. C. A. § 398).]

4. All those disturbing consequences vanish, if "felony" in the sentence in question is limited, as I would limit it, in two ways: (a) To mean only those acts which are felonies under federal law, i. e., defined, in Title 18 U. S. C. A. § 541, as federal crimes punishable by imprisonment for more than a year. (b) To mean only such federal felonies as affect the banks covered by § 588b—in other words to mean felonies against and not in such banks.[7]

The majority opinion surprisingly says that there is no reason to believe that that second limitation was intended by Congress. That comment ignores the title of the 1937 statute ("To amend the bank-robbery statute to include burglary and larceny") and the Attorney General's 1937 letter (which spoke of burglary and larceny "of" a bank).

In the field of government as well as in the field of science, the so-called "law of parsimony" should generally govern: One should, ordinarily, not use an elaborate method of accomplishing a result when a simpler method is available.[8] And so here, the direct route to the accomplishment of the Congressional

22 purpose should be employed instead of resorting to the roundabout method of traveling through state law.

5. The majority opinion stresses the fact that the Attorney General, in 1937, proposed to make it a federal crime to enter a bank with intent to commit any "depredation." I fail to see the significance of that fact: (a) In the first place, the word "depredation" has no special legal connotation. The treatise, Words and Phrases, which includes all judicial definitions of words from 1658

[7] And larceny means larceny from and not in a bank.

[8] Thus modern science, instead of adapting, by complicated elaboration, the Ptolemaic theory, has adopted simpler methods of explaining the movements of the heavenly bodies. Cf. as to recent developments in physics, Bridgman, The Logic of Modern Physics. See Union Electric Company of Missouri, 5 S. E. U. 253, 261, note 15 (1939).

to 1942, has no citations of any judicial use of that term. In lay usage, it means the act of plundering, preying upon, pillaging and the like, implying perhaps the use of violence. (b) And Congress rejected that word in enacting the 1937 amendments.

6. The majority opinion, in support of its interpretation of "felony" as including every state-law felony, refers to the fact that subdivision (d) of § 588b provides: "Jurisdiction over any offense defined by this Act shall not be reserved exclusively to courts of the United States." But that provision was in that section when it was originally enacted in 1934—at a time when the word "felony" was not contained therein; no one would suggest that its provisions as they stood in 1934—i. e., those relating to taking by force and violence—had the effect of importing any state-law crime. The federal Employer's Liability Act, 45 U. S. C. A. § 56, provides that suits brought thereunder may be brought in state courts; yet no one would think of suggesting that that extension of jurisdiction to the state courts affects the meaning of that statute.

7. The majority opinion suggests that the interpretation which I give the statute will render difficult prosecution for burg-
23 lary of a bank, because, it is suggested, under that interpretation, it will be necessary to prove an intent to steal or purloin bank property. But prosecution for burglary—even state-law burglary—always necessitates proof of a criminal intent; and it is an easy inference for a jury that a man caught while breaking into and entering a bank had the intent to steal the bank's property.

8. The majority opinion concedes, in effect, that "larceny" in § 588b must mean petit larceny, as otherwise "larceny" would be superfluous (since larceny which is not petit larceny is already covered by "felony" in that section). But the majority builds on the use of the word "larceny" the following argument designed to show that both "larceny" and "felony" in § 588b must include state-law larceny and felony: "Larceny," it is said, is nowhere defined in the federal statutes; it is only by referring to common-law that one can learn that to "steal or purloin" connotes petit larceny (i. e., larceny when it is not a felony); for the common law one must turn to state-law; consequently "larceny" must at least include state-law petit larceny. And, so the argument runs, if "larceny" in § 588b includes state-law larceny, "felony" in that section must include state-law felony. To that argument there are several answers:

(a) In defining "felony," there is no need to refer to state law, as a felony is defined in the federal criminal code, 18 U. S. C. A. § 541. [I do not understand the majority to go so far as to say that "felony" in that section includes state felonies.]

(b) The word "larceny" is as fully defined in § 588b as is the word "robbery." And the majority opinion states that the word

"robbery" is defined in that section without recourse to state law, reasoning that the use of the word "robbery" in the title of that statute, as enacted in 1934, plus the description of the crime of robbery (i. e., taking by force and violence, etc.) in the
24 section, constitute such a definition. By the very same reasoning, larceny is defined in § 588b without recourse to state law; for the word "larceny" is used in the 1937 amendatory statute and the crime of larceny (i. e., stealing or purloining) is described in that section.

Moreover, "larceny" is found elsewhere in the federal criminal code in an old statute, 18 U. S. C. A. § 466, relating to acts on land under the exclusive jurisdiction of the United States; the title of that section has always referred to "larceny" and the federal crime there described is "to take away, with intent to steal or purloin, any personal property of another." So that, staying within the confines of the federal statutes, we find an old use of larceny to define the crime which is described in § 588b.

(c) Both the Constitution and the federal statutes employ many terms which are not there defined and the meaning of which can be ascertained only by turning to the common law. But that common law thus utilized for that purpose is not the common law of any particular state; and no one would argue that recourse to common law for that purpose imports into the federal Constitution or statutes the laws of any particular state. See the concurring opinion of Mr. Justice Jackson in D'Oench, Duhme & Co., Inc., v. F. D. I. C., U. S. (March 12, 1942); cf. United States v. Forness, 125 F. (2d) 928 (C. C. A. 2).

So it seems clear to me that "larceny" as used in § 588b means the federal larceny of stealing or purloining from the banks therein referred to, and that "felony" as there used means any federal felony affecting such banks.[9]

9. The majority opinion suggests that this interpretation which I give to the sentence in question reduces it to a mere
25 "attempt" provision, ineptly worded. That is not correct. The sentence itself explicity makes a federal crime of the "attempt" to enter with the specified intent. The entry (or attempt to enter) with such intent creates the federal crime of burglary (or attempting to commit a burglary). It also creates the federal crime of peaceably entering (or attempting to enter) with such intent; to that ex[illegible]at, it is an "attempt" provision.[10]

[9] Another federal felony affecting banks is found in The National Stolen Property Act, 18 U. S. C. A. § 413; see § 414 ibid. Entering a bank with intent to commit that felony is a crime under 12 U. S. C. A. § 588b as I interpret it. And if Congress should hereafter enact legislation creating other felonies affecting banks, then entering or attempting to enter a bank with intent to commit the same will automatically be a crime under 12 U. S. C. A. § 588b.

[10] In a sense, the crime of burglary is itself a crime which consists of an attempt to commit another crime for burglary is breaking and entering with the intent to do an unlawful act and is punishable whether or not that other act is performed.

The majority opinion intimates that appellant's forgery is perhaps punishable under that part of § 588b which punishes the taking or carrying away of a bank's property

10. The 1940 amendment to § 588b makes it a federal crime to "receive, possess, conceal, store, barter or dispose" of any property, knowing it to have been taken from a bank in violation of the other provisions of that section. The majority opinion argues that the effect of not defining the phrase "entering or attempting to enter a bank with intent to commit any felony" so as to include all state felonies will be to "sadly limit" that 1940 amendment. Why? It will include receiving, possessing, etc., any property stolen or purloined from a bank. That is not a "sad" limitation.

11. I agree, in general, with the dissenting opinion in Hudspeth v. Melville, 127 F. (2d) 373, 377 (C. C. A. 10);[11] I especially agree with the point there made that, since this is a penal statute, it should not, by construction, be generously construed in favor of the government.

26 Supreme Court of the United States

No. 325, October Term, 1942

Order granting motion for leave to proceed in forma pauperis

October 12, 1942

On consideration of the motion for leave to proceed herein in forma pauperis,

It is ordered by this Court that the said motion be, and the same is hereby, granted.

27 Supreme Court of the United States

No. 325, October Term, 1942

Order allowing certiorari

Filed October 12, 1942

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit is granted.

---

of money "with the intent to steal or purloin" on the ground that "purloin" includes forgery. Aside from the fact that here the appellant procured no money or property but merely attempted to do so—so that the crime, if any, would be that of an attempt to purloin—the short answer is that, in the federal statutes, "steal or purloin" have been used to connote larceny. See 18 U. S. C. A. § 466.

[11] See also the dissenting opinion in Hudspeth v. Tornello, 128 F. (2d) 172 (C. C. A. 10).

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

[Endorsement on cover:] In forma pauperis. Enter Petitioners pro se. File Nos. 46826, 46827. U. S. Circuit Court of Appeals, Second Circuit. Term No. 325. Jerome Parker Jerome, Petitioner vs. The United States of America. Petitions for writs of certiorari. Filed August 21, 1942. Term Nos. 325 O. T. 1942, 326 O. T. 1942.

U. S. GOVERNMENT PRINTING OFFICE: 1942

FILE COPY

Office - Supreme Court, U. S.
FILED
SEP 14 1942
CHARLES ELMORE CROPLEY
CLERK

Nos. 325, 326

In the Supreme Court of the United States

OCTOBER TERM, 1942

JEROME PARKER JEROME, PETITIONER

v.

UNITED STATES OF AMERICA

ON MOTIONS FOR LEAVE TO PROCEED IN FORMA PAUPERIS AND ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION TO THE GRANTING OF THE PETITIONS FOR WRITS OF CERTIORARI

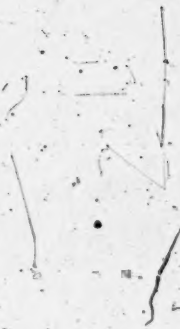
INDEX

	Page
Opinions below	1
Jurisdiction	1
Questions presented	2
Statutes involved	2
Statement	4
Argument	6
Conclusion	14

CITATIONS

Cases:	
Aderhold v. *Soileau*, 67 F. (2d) 259	14
Finch, In re, 156 Wash. 609	7
Hodgskin, Matter of, 193 App. Div. (N. Y.) 217	7
Hudspeth v. *Melville*, 127 F. (2d) 373	6, 14
Hudspeth v. *Tornello*, 128 F. (2d) 172, now pending on petition for writ of certiorari, No. 163, October Term, 1942	6, 14
Kerl, In re, 32 Idaho 737	7
Kirby, In re, 10 S. D. 322	7
Minner, In re, 133 Kan. 789	7
O'Connell, In re, 184 Cal. 584	7
Seitz v. *State Medical Board*, 24 Ohio App. 154	7
State ex rel. Anderson v. *Fousek*, 91 Mont. 448	7
State v. *Merriweather*, 136 Kan. 337	7
Statutes:	
Act of May 14, 1930, c. 274, 46 Stat. 327, Sec. 9, as amended (18 U. S. C. 753h)	4
Act of May 18, 1934, c. 304, 48 Stat. 783:	
Sec. 1, as amended (12 U. S. C. 588 (a))	3
Sec. 2, as amended (12 U. S. C. 388b (a))	2
Public Laws of Vermont (1933):	
Sec. 8485	6
Sec. 8750	6
Miscellaneous:	
78 Cong. Rec. 5738, 8132–8133, 8264, 8322, 8778, 8857	11
H. Rep. No. 1461, 73d Cong., 2d Sess	11
H. Rep. No. 1598, 73d Cong., 2d Sess	11
1 *Law and Contemporary Problems* (1934) 445, 448–449	12
S. 2841, 73d Cong., 2d Sess., Secs. 2 and 3	10
S. Rep. No. 537, 73d Cong., 2d Sess	10

491222—42——1



In the Supreme Court of the United States

OCTOBER TERM, 1942

Nos. 325, 326.

JEROME PARKER JEROME, PETITIONER

v.

UNITED STATES OF AMERICA

ON MOTIONS FOR LEAVE TO PROCEED IN FORMA PAUPERIS AND ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION TO THE GRANTING OF THE PETITIONS FOR WRITS OF CERTIORARI

OPINIONS BELOW

The majority and dissenting opinions in the circuit court of appeals (R. 40–64) are not yet reported.

JURISDICTION

The judgments of the circuit court of appeals were entered August 3, 1942 (No. 325, R. 68; No. 326, R. 69). The petitions for writs of certiorari were filed August 21, 1942. The jurisdiction of this Court is conferred by Section 240 (a) of the Judicial Code, as amended by the Act of February

13, 1925. See also Rule XI of the Criminal Appeals Rules, promulgated by this Court May 7, 1934.

QUESTIONS PRESENTED

1. In No. 325 the question presented is the same as that involved in *Tornello* v. *Hudspeth*, No. 163, now pending on petition for a writ of certiorari, *i. e.*, whether the words "any felony" in the clause of the Bank Robbery Act interdicting entry of a bank with intent to commit "any felony or larceny" include felonies under the law of the state in which the particular bank is located.

2. If the question in No. 325 is answered in the negative, the petition in No. 326 raises the question whether Section 9 of the Act of May 14, 1930, as amended, is violated by one who escapes while in custody of a United States Marshal under a warrant charging entry of a national banking institution with intent to commit a felony under the law of the state.

STATUTES INVOLVED

Section 2 (a) of the Act of May 18, 1934, c. 304, 48 Stat. 783, as amended by the Act of August 24, 1937, c. 747, 50 Stat. 749 (12 U. S. C. 588b (a)), commonly called the Bank Robbery Act, reads as follows:

> Whoever, by force and violence, or by putting in fear, feloniously takes, or feloniously attempts to take, from the person or presence of another any property or money

or any other thing of value belonging to, or in the care, custody, control, management, or possession of, any bank,[1] or whoever shall enter or attempt to enter any bank, or any building used in whole or in part as a bank, with intent to commit in such bank or building, or part thereof, so used, any felony or larceny, shall be fined not more than $5,000 or imprisoned not more than twenty years, or both; or whoever shall take and carry away, with intent to steal or purloin, any property or money or any other thing of value exceeding $50 belonging to, or in the care, custody, control, management, or possession of any bank, shall be fined not more than $5,000 or imprisoned not more than ten years, or both; or whoever shall take and carry away, with intent to steal or purloin, any property or money or any other thing of value not exceeding $50 belonging to, or in the care, custody, control, management, or possession of any bank, shall be fined not more than $1,000 or imprisoned not more than one year, or both.

---

[1] Defined in Section 1 of the Act of May 18, 1934, c. 304, 48 Stat. 783, as amended by Section 333 of the Act of August 23, 1935, c. 614, 49 Stat. 720 (12 U. S. C. 588a), as including "any member bank of the Federal Reserve System, and any bank, banking association, trust company, savings bank, or other banking institution organized or operating under the laws of the United States and any insured bank as defined in subsection (c) of section 12B of the Federal Reserve Act, as amended [any bank the deposits of which are insured by the Federal Deposit Insurance Corporation]."

Section 9 of the Act of May 14, 1930, c. 274, 46 Stat. 327, as amended by the Act of August 3, 1935, c. 432, 49 Stat. 513 (18 U. S. C. 753h), provides in part:

> Any person * * * who is in custody by virtue of any process issued under the laws of the United States by any court, judge, or commissioner, or who is in custody of an officer of the United States pursuant to lawful arrest, who escapes or attempts to escape from such custody * * * shall be guilty of an offense. If the custody or confinement is by virtue of an arrest on a charge of felony, or conviction of any offense whatsoever, the offense of escaping or attempting to escape therefrom shall constitute a felony and any person convicted thereof shall be punished by imprisonment for not more than five years or by a fine of not more than $5,000, or both; * * *. The sentence imposed hereunder shall be in addition to and independent of any sentence imposed in the case in connection with which such person is held in custody at the time of such escape or attempt to escape. * * *

STATEMENT

On October 16, 1941, petitioner was indicted in the District Court for the District of Vermont for unlawfully, wilfully, and feloniously entering the Howard National Bank and Trust Company of Rutland, Vermont, a national bank and a member of the Federal Reserve System, with intent to com-

mit "a felony, to wit, knowingly, wilfully and feloniously to utter and publish to said bank, as true, a promissory note in the amount of Five Hundred Dollars ($500), with the endorsement thereon of 'Henry S. Derby,' which endorsement was forged, the [petitioner] well knowing said endorsement to be forged, with intent to defraud said bank and the said Henry S. Derby" (No. 325 R. 2, 5–6). A second indictment was returned against petitioner on February 12, 1942, which charged that on November 15, 1941, he unlawfully, wilfully, and feloniously escaped from the custody of the United States Marshal for the District of Vermont while being held by virtue of a warrant issued on August 1, 1941, by a United States Commissioner for the District of Vermont charging petitioner with having feloniously entered a national banking institution with intent to commit a felony (No. 326, R. 2, 4–5). On April 8, 1942, after separate jury trials (No. 325, R. 10; No. 326, R. 9), petitioner was convicted on both indictments (No. 325, R. 32; No. 326, R. 36) and was sentenced to imprisonment for one year and a day on each, the sentences to run consecutively (No. 325, R. 33; No. 326, R. 37).

On appeal the court below affirmed the convictions (No. 325, R. 65; No. 326, R. 69). The judgment of affirmance in No. 326, the escape case, was unanimous, but in No. 325 Judge Frank dissented; he was of the opinion that the words "any felony" in Section 2 (a) of the Bank Robbery Act should

be limited to offenses which are felonies under federal law and which affect the banks covered by the statute, and should not be construed as embracing felonies under state law (No. 325, R. 52–64).[1]

ARGUMENT

1. Petitioner's sole contention in No. 325 is that the words "any felony," as used in the second clause of Section 2 (a) of the Bank Robbery Act (*supra*, pp. 2–3), do not include felonies under state law.[2] The majority of the court below, like the majority of the Tenth Circuit in *Hudspeth* v. *Melville*, 127 F. (2d) 373, and *Hudspeth* v. *Forbello*, 128 F. (2d) 172, now pending on petition for a writ of certiorari (No. 163), held that in the light of the language, the history, and the purposes of

[1] Since petitioner does not question the sufficiency of the evidence in either case, it is unnecessary to delineate the proof adduced at the trials. The evidence, however, is summarized in the opinion of the circuit court of appeals (No. 325, R. 41–42).

[2] Petitioner does not question that uttering and publishing a promissory note bearing a forged endorsement is a felony under Vermont law. Section 8485 of the Public Laws of Vermont (1933) provides: "A person who utters and publishes as true a forged, altered or counterfeited record, deed, instrument or other writing mentioned in the preceding section [including a promissory note or any endorsement or assignment of a note], knowing the same to be false, altered, forged, or counterfeited, with intent to injure or defraud a person, shall be imprisoned in the state prison not more than ten years and fined not more than one thousand dollars." Section 8750 provides: "Offenses which may be punished by death or imprisonment in the state prison are felonies; all other offenses are misdemeanors."

the statute these words do comprehend state felonies."

In our memorandum in opposition in the *Tornello* case we have fully discussed the considerations which in our view impel the conclusion that Congress intended by the use of the words "any felony" to include at least such state felonies as affect the financial condition of a bank.[1] In this

[1] The opinion below is somewhat broader than the view expressed by the Tenth Circuit in the *Melville* case and followed in the *Tornello* case; the latter court construed the statute as including only acts denounced as felonies under state laws which have relation to the protection, preservation, and efficiency of banks, whereas the court below thought that the statute embraces all state felonies (see No. 325, R. 48, 49–51). The Tenth Circuit apparently adopted the more narrow construction in order to avoid possible constitutional difficulties (see the comments of Judge Huxman, dissenting in the *Melville* case, 127 F. (2d), at 377). However, there is no occasion to consider whether the statute should be so limited because in both the *Tornello* and the instant cases the state felonies involved unquestionably affect the financial condition of a bank (see our memorandum in opposition in the *Tornello* case, No. 163, p. 6, and n. 14, p. 14).

[2] The interpretation that the words "any felony" in the statute include state felonies is supported also by numerous state decisions construing "felony," as used in state statutes, as embracing not only state felonies but federal felonies as well. *In re O'Connell*, 184 Cal. 584 (1920); *In re Keel*, 32 Idaho 737, 741–742 (1920); *In re Misner*, 133 Kan. 789, 790–793 (1931); *State ex rel. Anderson* v. *Fousek*, 91 Mont. 448, 454–455 (1932); *Matter of Hodgskin*, 193 App. Div. (N. Y.) 617 (1920); *Seitz* v. *State Medical Board*, 24 Ohio App. 154, 158–159 (1926); *In re Kirby*, 10 S. D. 322, 328 (1897); *In re Finch*, 156 Wash. 699 (1930). Cf. *State* v. *Merriweather*, 136 Kan. 337, 339 (1932), where a state statute providing

memorandum it will suffice to consider the arguments advanced by the dissenting judge below in support of his view that this language embraces only federal felonies.

a. The first argument of the dissenting judge is that the 1937 amendments of Section 2 (a) of the Bank Robbery Act—one making larceny of property exceeding $50 in value a felony and larceny of property not exceeding $50 in value a misdemeanor, and the other punishing entering or attempting to enter a bank with intent to commit any felony or larceny—"nicely correlate," the first change making stealing from a bank either a federal felony or federal petit larceny, and the second making it a federal crime to enter or attempt to enter a bank with intent to commit "such a federal felony or federal larceny" (R. 54). It will be observed, in the first place, that this suggested construction is much narrower than that adopted later in the dissenting opinion as the proper one. The proper construction of "any felony," according to the dissenting judge, is *any* federal felony affecting national banks (R. 54, 60). Apart from this inconsistency, the history of the amendments shows that the conclusion is untenable. As we pointed out in our memorandum in opposition in the *Tornello* case (pp. 8, 10–11), at

---

that a person convicted a second time of felony shall be confined in the penitentiary not less than double the time of the first conviction, was held to be applicable to a person previously convicted of a felony in another state.

the time the House Judiciary Committee inserted the words "any felony or larceny," larceny of any money or property from a bank, regardless of value, was punishable, under the clause immediately following, by imprisonment for not more than twenty years, and was therefore a felony. The distinction between larceny of money or property exceeding $50 in value and larceny of money or property not exceeding $50 in value, the former being made a felony and the latter a misdemeanor, was not made until after the bill had reached the floor of the House. Hence, the word "larceny" does not have the significance which the dissenting judge attaches to it. On the contrary, since the Committee's draft had made any larceny a felony, there was no need for the Committee to include larcenies if it was speaking only of federal felonies.[6]

b. The next argument is based on the legislative history of the original Bank Robbery Act of May

[6] The majority below was in error when it stated that the phrase "any felony or larceny" was substituted for "any larceny or other depredation" on the floor of the House in order to meet an objection that the bill as reported by the Committee placed simple larceny on the same plane as robbery and breaking and entering (No. 325, R. 45–46). As pointed out in our memorandum in opposition in the *Tornello* case (pp. 9, 10–11), this change was made in Committee. This error, however, does not affect the validity of the majority's interpretation; the action of the Committee in inserting the substituted phrase indicates that it meant to define burglary in the modern sense as entry with intent to commit a felony and thus supports the view that it meant any felony, state or federal (*ibid.*)

18, 1934 (R. 54–56). It is pointed out that the Attorney General's draft of that statute would have made it an offense to break into a bank with intent to commit any felony under federal or state law, but that Congress rejected the proposal.[1]

---

[1] S. 2841, 73d Cong., 2d sess., which subsequently became the original Bank Robbery Act of May 18, 1934, contained, in addition to the sections which later became law, the following two sections when it was passed by the Senate (78 Cong. Rec. 5738):

"SEC. 2. Whoever, not being entitled to the possession of property or money or any other thing of value belonging to, or in the care, custody, control, management, or possession of, any bank, takes and carries away, or attempts to take and carry away, such property or money or any other thing of value from any place (1) without the consent of such bank, or (2) with the consent of such bank obtained by the offender by any trick, artifice, fraud, or false or fraudulent representation, with intent to convert such property or money or any other thing of value to his use or to the use of any individual, association, partnership, or corporation other than such bank, shall be punished by a fine of not more than $5,000 or imprisonment for not more than 10 years, or both.

"SEC. 3. Whoever breaks into, or attempts to break into, any building or part thereof used as a place of business by any bank, with intent to commit in such building or part thereof so used any offense defined by this act or any felony under any law of the United States or under any law of the State, District, Territory, or possession where such building is located, shall be fined not more than $5,000 or imprisoned not more than 10 years, or both."

These sections were in the draft proposed by the Attorney General and were recommended by the Senate Judiciary Committee (see S. Rep. No. 537, 73d Cong., 2d sess.). The House Judiciary Committee, however, in recommending the

From this it is argued that the failure of the Attorney General, in submitting his proposed amendments in 1937, to suggest any reference to state law—"obvious verbiage if the purpose was to include state-law felonies" (R. 55)—indicates that no such purpose was entertained. But the Attorney General's draft, as we pointed out in our memorandum in opposition in the *Tornello* case (p. 8), did not refer to "felony" at all; it proposed to penalize entering or attempting to enter a bank with intent to commit "any larceny or other depredation." It was the House Judiciary Committee that substituted the word "any felony or larceny." Nor is it reasonable to assume from the Committee's failure to specify expressly that federal and state felonies were included, that state felonies were intended to be excluded. Instead, the comprehensive language used by the Committee, when interpreted in the light of the purpose of the amendments to broaden the scope of federal protection, indicates that the Committee

---

enactment of the bill, amended it by striking out the above sections entirely and making Sections 4, 5, and 6 of the bill as passed by the Senate, Sections 2, 3, and 4, respectively (H. Rep. No. 1461, 73d Cong., 2d sess.). The bill, as so amended, was passed by the House (78 Cong. Rec. 8132-8133). When the Senate disagreed to the House amendments, which the House insisted upon (78 Cong. Rec. 8264, 8322), a conference was called, and the bill was finally passed with the House amendments (H. Rep. No. 1598, 73d Cong., 2d sess.; 78 Cong. Rec. 8778, 8857).

intended to include at least all felonies affecting banks, whether state or federal (see memorandum in opposition in the *Tornello* case, pp. 9–10).

c. It is further argued (R. 57–58) that it is "highly unlikely" that Chairman Sumners of the House Judiciary Committee, whose objections led to the elision of the fraud provisions contained in Section 2 of the Senate's version of the 1934 bank robbery bill (see footnote 7, *supra*), and who introduced in the House the bill containing the amendments proposed by the Attorney General in 1937, abandoned those objections in 1937 without explanation and "urged legislation which not only covered the crime of fraud on a bank * * * but went much further." Aside from the highly speculative nature of this argument, and aside from the fact that it confuses fraud and entry with intent to commit a felony consisting of fraud, it should be pointed out that Chairman Sumners was also opposed to the larceny provision contained in Section 2 of the Senate's version of the 1934 bill.[8] Yet he did not oppose the larceny provisions of the 1937 amendments. In fact, he introduced the draft of the bill submitted by the Attorney General (see memorandum in opposition in the *Tornello* case, p. 8). There is, therefore, no reason to suppose that he was opposed to amend-

[8] See 1 *Law and Contemporary Problems* (1934) 445, 448–449.

ing the law in 1937 to punish the entering of a bank with intent to commit a felony consisting of fraud.

d. The fact that, under the majority's interpretation, forgery itself is not a federal offense, while entering a bank with intent to commit forgery is a federal offense, provided that forgery is a felony under the state law, is referred to by the dissenting judge as an "outstanding awkwardness" and "curious consequence" of that interpretation (R. 58–59). This is but a criticism of the wisdom of the law in failing to go far enough in protecting national banks, and hence not a subject of judicial concern. Moreover, the proffered difficulty (R. 58) that, if a man enters a bank with intent to commit the state crime of forgery, he is, under the majority's interpretation, guilty of a federal crime, even if that intent is frustrated, applies equally to the interpretation that the words "any felony" refer only to federal felonies.[9]

2. In his petition in No. 326, petitioner concedes (Pet. 2) that his conviction under Section 9 of the Act of May 14, 1930, as amended (18 U. S. C. 753h,

[9] Other "awkward" consequences (R. 59–60) are based on the supposition that the words "any felony" include felonies bearing no relation to the protection of national banks and the currency. However, as pointed out above (see footnote 4), the question whether such felonies are included is not presented because the felony involved here bears a direct relationship to the protection of a bank.

supra, p. 3) was proper if the indictment under Section 2 (a) of the Bank Robbery Act stated a federal offense, but he contends that if that indictment did not state a federal offense he was not required to "resort to legal process" to obtain his release from custody, but was entitled to "employ self help" to regain his liberty (Pet. 2–3). We think this contention is utterly without merit. The statute, as the circuit court of appeals said (R. 51), "clearly is intended to reach anyone who is held by virtue of any proper and legal process." See also, *Aderhold* v. *Soileau*, 67 F. (2d) 259, 260 (C. C. A. 5).

CONCLUSION

The decision of the circuit court of appeals in No. 325 construing the words "any felony" in the Bank Robbery Act as including felonies under state law is in substantial accord with the construction adopted by the Tenth Circuit in *Hudspeth* v. *Melville*, 127 F. (2d) 373, and followed by that court in *Hudspeth* v. *Tornello*, 128 F. (2d) 172, which is now pending on petition for a writ of certiorari (No. 163). That construction is consistent with the language, history, and purpose of the statute, and since there is uniformity of decisions among the two circuit courts of appeals which have had occasion to consider the question, we submit that the petition for a writ of certiorari should be denied.

The decision below in No. 326 is clearly correct, and no conflict of decisions or question of importance is presented. The petition in this case should also be denied.

Respectfully submitted.

CHARLES FAHY,
Solicitor General.

WENDELL BERGE,
Assistant Attorney General.

ROBERT S. ERDAHL,
PHILIP R. MONAHAN,
WALTER J. CUMMINGS, JR.,
Attorneys.

SEPTEMBER 1942.

U. S. GOVERNMENT PRINTING OFFICE: 1942

Office - Supreme Court, U. S.
FILED
JAN 6 1943
CHARLES ELMORE CROPLEY
CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1942

No. 325

JEROME PARKER JEROME,

Petitioner,

vs.

THE UNITED STATES OF AMERICA.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF FOR PETITIONER.

JOHN T. SAPIENZA,
Counsel for Petitioner.

INDEX

	Page
Opinions below	1
Jurisdiction	1
Question presented	2
Statutes involved	2
Statement	2
Summary of argument	4
Argument:	
In entering a national bank with intent to do an act which is neither a federal nor a common-law felony, the petitioner was not guilty of entry with intent to commit a felony within the meaning of the Bank Robbery Act	6
I. The Bank Robbery Act requires entry with intent to commit a federal felony affecting the bank	8
A. The Act defines a limited group of offenses (robbery, burglary and larceny) against banks	8
B. On the face of the statute, the phrase "any felony" clearly refers to federal felonies affecting the banks	11
C. The legislative history of the Bank Robbery Act shows that Congress did not intend to include state felonies	18
II. The Bank Robbery Act requires entry with intent to commit a common-law felony affecting the bank	26
Conclusion	28
Appendix "A"	29
Appendix "B"	32

CITATIONS

Cases:

Albrecht v. *United States*, 273 U. S. 1	24
Arnold v. *State*, 127 Tex. 89	18
Bannon v. *United States*, 156 U. S. 464	13, 16, 27
Carpenter v. *Hudspeth*, 112 F. (2) 126	24
Collins v. *McDonald*, 258 U. S. 416	12
Commissioner v. *Beck's Estate*, 129 F. (2) 243	17

Page

Considine v. *United States*, 112 Fed. 342 16
Conyer v. *United States*, 80 F. (2) 292 . . . . . 12, 16
Crabb v. *Zerbst*, 99 F. (2) 562 17
Deal v. *United States*, 274 U. S. 277 22
D'Oench, Duhme & Co. v. *F. D. I. C.*, 315 U. S. 447 12
Ebeling v. *Morgan*, 237 U. S. 625 24
Farrington v. *Tennessee*, 95 U. S. 679 16
Fasulo v. *United States*, 272 U. S. 620 17
Fox v. *State*, 5 How. 410 6
Hallock v. *United States*, 185 Fed. 417 16
Harrison v. *United States*, 163 U. S. 140 27
Hudspeth v. *Melville*, 127 F. (2) 373 . . . . . 6, 23
Hudspeth v. *Tornello*, 128 F. (2) 172 . . . . . 6, 23
Lanzetta v. *New Jersey*, 306 U. S. 451 11
Levinson v. *United States* 27
McCulloch v. *Maryland*, 4 Wheat. 316 10
Moore v. *Chesapeake & Ohio Railway*, 291 U. S. 205 14
Morgan v. *Devine*, 237 U. S. 632 24
National Bank v. *Matthews*, 98 U. S. 621 17
Oliver v. *United States*, 230 U. S. 971 27
People v. *Bigelow*, 94 Cal. App. 28 18
People v. *Thomas*, 63 Cal. 482 24
Railroad v. *Grant*, 98 U. S. 398 17
Reagan v. *United States*, 157 U. S. 301 . . . . . 13, 16, 27
Russell v. *United States*, 119 F. (2) 686 16
Seaboard Air Line Railway v. *Horton*, 233 U. S. 492 . . . . . 14, 16
State v. *Merriweather*, 136 Kan. 337 18
Territory v. *Willard*, 8 Mont. 328 24
Todd v. *United States*, 158 U. S. 278 17
United States v. *Baugh*, 1 Fed. 784 16
United States v. *Chase*, 135 U. S. 255 17
United States v. *Coppersmith*, 4 Fed. 198 . . . . . 6, 15
United States v. *Cohen*, 274 Fed. 596 17
United States v. *Cohen Grocery Co.*, 255 U. S. 81 11
United States v. *Daubner*, 17 Fed. 793 16
United States v. *De Quilfeldt*, 5 Fed. 276 16
United States v. *Falkenheimer*, 21 Fed. 624 16
United States v. *Freeman*, 3 How. 556 14
United States v. *Gradwell*, 243 U. S. 476 17
United States v. *Kraus*, 270 Fed. 578 12
United States v. *Mangus*, 33 F. Supp. 596 16

Page

United States v. *Nickerson*, D. N. J. Unreported 26, 27
United States v. *Novech*, 273 U. S. 202 24
United States v. *Palmer*, 3 Wheat. 610 27
United States v. *Patton*, 120 F. (2) 73 . . . . . 12, 23, 27
United States v. *Resnick*, 299 U. S. 207 17
United States v. *Slutzky*, 79 F. (2) 504 26
United States v. *Smith*, 5 Wheat. 153 27
United States v. *Stewart*, 311 U. S. 60 14
United States v. *Trinder*, 1 F. Supp. 659 17
United States v. *Weil*, 46 F. Supp. 323 6
Westfall v. *United States*, 274 U. S. 256 10
Ex parte Wilson, 114 U. S. 417 27
In re Wilson, 18 Fed. 33 . . . . . 6, 16

Statutes:

Act of July 7, 1898, 30 Stat. 717, as amended March 4, 1909, 35 Stat. 1145, 18 U.S.C. Sec. 468 . . . . . 16, 32
Act of May 25, 1900, 31 Stat. 188, as amended March 4, 1909, 35 Stat. 1137, 18 U.S.C. Sec. 392 32
Act of February 2, 1903, 32 Stat. 793, as amended March 4, 1909, 35 Stat. 1151, 18 U.S.C. 549 33
Act of March 4, 1909, 35 Stat. 1151, as amended June 19, 1937, 50 Stat. 304, 18 U.S.C. 542 33
Act of June 25, 1910, 36 Stat. 821, 18 U.S.C. Sec. 722 34
Act of March 1, 1913, 37 Stat. 699 35
Act of March 3, 1917, 39 Stat. 1069, as amended March 4, 1917, 39 Stat. 1202, February 24, 1919, 40 Stat. 1151, 18 U.S.C. Sec. 341 32
Act of June 11, 1932, 47 Stat. 301, 18 U.S.C. Sec. 622a 34
Act of May 18, 1934, 48 Stat. 782, 18 U.S.C. Sec. 408e 32
Act of February 22, 1935, 49 Stat. 31, 15 U.S.C. Sec. 715b 35
Act of June 25, 1936, 49 Stat. 1928, 27 U.S.C. Sec. 223 35
Bank Robbery Act (Act of May 18, 1934, c. 304, 48 Stat. 783, as amended Act of August 24, 1937, c. 747, 50 Stat. 749, 12 U.S.C. 588b(a)) 29
Sec. 1 29
Sec. 2(a) . . . . . *passim*
Sec. 2(b) . . . . . *passim*
Sec. 2(c) . . . . . *passim*
Sec. 3 9
Sec. 4 35

Page

Criminal Code
Sec. 37, 18 U.S.C. Sec. 88 11
Sec. 192, 18 U.S.C. Sec. 315 22
Sec. 335, 18 U.S.C. Sec. 541 ..... 2, 13, 15, 30
Federal Reserve Act, 49 Stat. 684, 12 U.S.C. Sec. 264(c) 8, 30
National Stolen Property Act, 48 Stat. 794, as amended 53 Stat. 1178, 18 U.S.C. Secs. 413–19 ..... 14, 23
The Mann Act, 36 Stat. 825, 18 U.S.C. Sec. 398 11
Narcotics Act, 38 Stat. 786, as amended 44 Stat. 1023, 1382, 26 U.S.C. Sec. 2553 11
Rev. Stat. Sec. 5209, as amended, 40 Stat. 972, 49 Stat. 704, 712, 18 U.S.C. Sec. 592 12
12 U.S.C. Secs. 596, 597 15
28 U.S.C. Sec. 424 15
Kan. Gen. Stat. (1935) Sec. 21–107(a), Sec. 21–108 18
N. J. Rev. Stat. (1937) Sec. 2: 132–1b 26
Public Laws of Vermont (1933)
Secs. 8400–8401 25
Secs. 8436–37 26
Sec. 8440 25
Sec. 8442 25
Secs. 8484–85 ..... 6, 30
Sec. 8750 ..... 6, 13, 30

Miscellaneous:
78 Cong. Rec. 2947 ..... 20, 24
78 Cong. Rec. 5738 19
78 Cong. Rec. 8132 20
81 Cong. Rec. 2731 20
81 Cong. Rec. 4656, 5376–77 21
81 Cong. Rec. 5409, 9197–98, 9331 21
1 Law and Contemporary Problems, 445, 448–49 20
Blackstone Comm., 227–28 22
Clark and Marshall, Crimes (3d ed.), Sec. 3, 392 ..... 6, 27
Hale P. C., 561–62 22
Wharton, Criminal Law (10th ed.), Sec. 23, 181, 633 ..... 6, 24 27
H. Rep. No. 1461, 73d Cong., 2d Sess., p. 2 ..... 19, 24
H. Rep. 1598, 73d Cong., 2d Sess 20
H. Rep. No. 732, 75th Cong., 1st Sess 11, 21
S. Rep. 537, 73d Cong., 2d Sess 19
H. Rep. No. 1668, 76th Cong., 3d Sess. 22
S. Rep. No. 1259, 75th Cong., 1st Sess 11

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1942

No. 325

JEROME PARKER JEROME,

Petitioner,

vs.

THE UNITED STATES OF AMERICA.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF FOR PETITIONER.

Opinions Below.

The majority (R. 1-8) and dissenting (R. 9-17) opinions in the circuit court of appeals are reported at 130 F. (2d) 514.

Jurisdiction.

The judgment of the circuit court of appeals was entered August 3, 1942 (Tr. 65[1]). The petition for a writ of certio-

[1] The reference "Tr." is to the stenographic transcript of the record in the lower court, which is on file in the office of the clerk of this Court. Only the opinions in the court below and this Court's orders granting petitioner's motion for leave to proceed *in forma pauperis* and allowing certiorari have been printed. The reference "R." is to this printed record.

rari was filed August 21, 1942 and was granted October 12, 1942 (R. 17-18). The jurisdiction of this Court rests upon Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925.

Question Presented.

Whether a person who enters a national bank with intent to utter a promissory note with a forged endorsement (which utterance is a felony under state law but not under federal or common law), is guilty of entering with intent to commit "any felony or larceny" within the meaning of the Bank Robbery Act.

Statutes Involved.

The controlling statutory provision, part of the Bank Robbery Act (Act of May 18, 1934, c. 304, 48 Stat. 783, as amended by the Act of August 24, 1937, c. 747, 50 Stat. 749, 12 U. S. C. 588b (a)), reads as follows:

> "* * * whoever shall enter or attempt to enter any bank, or any building used in whole or in part as a bank, with intent to commit in such bank or building, or part thereof, so used, any felony or larceny, shall be fined not more than $5,000 or imprisoned not more than twenty years, or both; * * *."

The Bank Robbery Act, Section 335 of the Federal Criminal Code, and certain Vermont statutes, which may be relevant, are quoted in full in Appendix A, *infra*, pp. 29-31.

Statement.

On October 14, 1941, the petitioner was indicted for alleged violation of Section 2(a) of the Bank Robbery Act. The indictment charged that he entered a national bank in Burlington, Vermont, "with intent to commit in such bank a

felony, to wit, knowingly, wilfully and feloniously to utter and publish to said bank, as true, a promissory note in the amount of Five Hundred Dollars ($500.00), with the endorsement thereon of 'Henry S. Derby,' which endorsement was forged, the said Captain Jerome Parker Jerome, alias Jerome P. Jerome, alias J. Parker Jerome, well knowing said endorsement to be forged, with intent to defraud said bank and the said Henry S. Derby; * * *" (Tr. 5-6). Utterance of a forged endorsement is felonious under the law of Vermont, but not under federal or common law. See p. 6, *infra*.

Evidence was introduced by the Government to show that on July 14, 1941, the petitioner, then a captain in the United States Army stationed at Fort Ethan Allen, Vermont, entered the Howard National Bank and Trust Company of Burlington, Vermont, for the purpose of borrowing $500.00. A note was made out for his use and given to him, with the statement that he would need the endorsement of another Army officer of at least equal rank. Later in the day the petitioner returned with the note bearing his signature and the endorsement of Henry S. Derby, Major, 71st Field Artillery Brigade. The note was discounted by the bank, and matured August 1, 1941. At the time of the trial it had not been paid, except for $48.24, the petitioner's balance at the bank which was applied upon the note at the due date. Major Derby testified that he did not sign the note or authorize the use of his name and that, in fact, he was not at Fort Ethan Allen on July 14, 1941 (Tr. 9-22).

Upon this evidence the jury returned a verdict of guilty to the charge in the indictment and the petitioner was sentenced to imprisonment for one year and a day (Tr. 32-33). Throughout the proceedings in the District Court, the petitioner contended that the indictment did not charge an offense against the laws of the United States (Tr. 7, 22-24, 30-32).

On appeal, the conviction was affirmed by a divided court (Tr. 65). In an opinion by Circuit Judge Clark, the majority rejected petitioner's contention that the evidence was insufficient to show knowledge on his part that the endorsement was forged and held that the words "any felony" in Section 2(a) of the Bank Robbery Act include all offenses which are felonious under state law (R. 1-8). Judge Frank, in a vigorous dissent, held that the words "any felony" mean any federal felony affecting a bank covered by the Bank Robbery Act; he made no comment upon the sufficiency of the evidence (R. 9-17).[2]

Summary of Argument.

The phrase "any felony" refers only to any federal felony affecting national and insured banks. The legislative purpose was to punish robbery, burglary and larceny of banks. Congress had no concern in other crimes committed in, but not against banks. Those were left to the states.

Under our federal system, Congress and the state legislatures are sovereign in their respective spheres. Each must be presumed to legislate without reference to the other. Congressional adoption of state law is the exception rather than the rule. By reference to other portions of the Bank Robbery Act and other federal statutes concerning the banks covered by the Bank Robbery Act, the words "any

[2] Although the petition for writ of certiorari did not question the sufficiency of the evidence, it may be questioned whether the Government proved beyond a reasonable doubt that the petitioner knew the endorsement was forged or that he had any intent to defraud—essential elements of the state felony charged. There was no direct evidence. The jury could have found the petitioner guilty only by inferring that he knew the endorsement was forged and then, upon the basis of that inference, by making the further inference that petitioner had the intent to defraud the bank to which the note was passed for value. It is just as plausible, however, to infer that he intended and had confident expectation of being able to pay his note on the due date.

felony" are given a content which effectuates the purpose of Congress. They mean robbery of the bank (larceny is specifically named), and any other act affecting the bank which is in violation of Section 2(c) of the Bank Robbery Act, National Stolen Property Act or any other present or future federal statute. This method of construction is consistent with the construction of "felony" in other statutes of Congress, as well as the well-established legislative practice of referring to the laws of the states when an act is made penal under federal law because it is criminal under state law.

The legislative history of the Bank Robbery Act shows very clearly that Congress did not intend to include state felonies. In 1934 it rejected a bill submitted by the Attorney General, which specifically defined intent as the intent to commit any felony under state or federal law. This bill had been drafted in accordance with the usual practice of Congress of referring to state law if state law was to be incorporated. Only three years later the same Attorney General submitted a bill which made no reference to state law, and Congress adopted the bill after changing "any larceny or other depredation" in the original proposal to "any felony or larceny." But the law made no reference to state felonies.

Nor is there any need to import state law into the Bank Robbery Act. All the elements of the three offenses are defined specifically in the Act or in other federal laws. In view of the familiar rule that a criminal statute should be construed strictly in favor of the defendant, any doubts must be resolved in favor of the petitioner and state felonies must be deemed excluded.

In the alternative, we submit that the terms "any felony or larceny" were taken from the common law and should be given their common-law meaning.

ARGUMENT.

In entering a national bank with intent to do an act which is neither a Federal nor a common-law felony, the petitioner was not guilty of entry with intent to commit a felony within the meaning of the Bank Robbery Act.

Utterance of a promissory note with a forged endorsement is not a crime under the laws of the United States. At common law it was a misdemeanor. See *In re Wilson*, 18 Fed. 33, 34 (E. D. Mich.); WHARTON, CRIMINAL LAW (10th ed.) Sec. 653. *Cf. Fox* v. *State*, 5 How. 410, 433; *United States* v. *Coppersmith*, 4 Fed. 198, 207 (C. C. W. D. Tenn.). At present, however, it has been made a felony by statute in most states. CLARK AND MARSHALL, CRIMES (3d ed.) Sec. 392. The Vermont Statute provides that a person who utters and publishes as true an endorsement of a promissory note, knowing it to be forged, with intent to injure or defraud another, shall be imprisoned in the state prison not more than ten years and fined not more than one thousand dollars. *Vt. Pub. Laws* (1933) Secs. 8484-85, quoted *infra* p. 31. Since offenses punishable by imprisonment in the state prison are defined as felonies, utterance of a forged endorsement upon a promissory note is felonious under Vermont law. *Id.* Sec. 8750. The question, therefore, arises whether "intent to commit * * * any felony" in the Bank Robbery Act, includes the intent to commit state felonies in national and insured banks.

The scope of the two words "any felony" has given rise to sharp disagreement among the members of the lower court and those of the Circuit Court of Appeals for the Tenth Circuit. Moreover, there is not complete agreement even between the majorities in the two circuits. The majority below has expressed the most extreme view—that the phrase "any felony" includes all state and federal

felonies committed in banks, whether directed against them or against persons who happen to be on the premises. The majority of the Circuit Court of Appeals for the Tenth Circuit has restricted the phrase to acts committed in a bank which have some relation to its protection, preservation and efficiency and which constitute a felony under the laws of the state in which the bank is located. *Hudspeth* v. *Melville*, 127 F. (2d) 373, 376; *Hudspeth* v. *Tornello*, 128 F. (2d) 172, now pending on petition for a writ of certiorari, No. 163, this Term.

In each of these cases and in the court below, strong protests were entered against the views of the majority. Judge Frank in the lower court and Judge Huxman in the Tenth Circuit both agreed that the words refer only to federal felonies affecting the banks. See R. 10; *Hudspeth* v. *Melville*, *supra*, at 377. In the *Tornello* case Judge Huxman, impelled by constitutional considerations, seems to have restricted them further to felonies defined by the Bank Robbery Act itself. Accord: *United States* v. *Weil*, 46 F. Supp. 323, 326 (E. D. Ark.)

We submit that the dissenting judges are clearly right in construing the statute as inapplicable to entries with intent to commit state felonies. The purpose of the statute was to punish a limited class of crimes against national and insured banks—a purpose fully accomplished by restricting burglary to entry with intent to commit a federal felony against the bank. The legislative history of the Act is clear demonstration that Congress did not intend to include state felonies. As an alternative construction of the statute, we suggest that the words "any felony" contemplate common-law felonies, not common-law misdemeanors made felonious by state statutes. Under either view, the statute is inapplicable to the petitioner, since uttering a forged endorsement is neither a federal nor a common-law felony.

I. The Bank Robbery Act requires entry with intent to commit a Federal felony affecting the bank.

A. The Act Defines a Limited Group of Offenses (Robbery, Burglary and Larceny) Against Banks.

Section 2 (a) of the Bank Robbery Act is a penal statute. It created the three specific offenses of robbery, burglary and larceny against national banks and state banks insured under the Federal Reserve Act, as amended (49 Stat. 684, 12 U. S. C. Sec. 264 (c)),[3] Assault with a dangerous weapon or device, murder and kidnapping in connection with the robbery, burglary or larceny were included in other portions of the statute. So was the receipt, possession or disposition of money or property known to have been taken in violation of Section 2 (a). But the primary goal was federal prosecution and punishment of robbery, burglary and larceny of the banks.

The 1934 Act was concerned only with bank robbery and with murder and kidnapping in the course of or immediately after the robbery. A bank robber was defined as one who "by force and violence, or by putting in fear, feloniously takes, or feloniously attempts to take, from the person or presence of another any property or money or any other thing of value belonging to or in the care, custody, control, management, or possession of, any bank, . . ." The penalty was fixed at a fine of not more than five thousand dollars or imprisonment of not more than twenty years, or both. Section 2 (b) increased the penalty if the

[3] In 1934 the term "bank" in the statute was defined as "any member bank of the Federal Reserve System, and any bank, banking association, trust company, savings bank, or other banking institution organized or operating under the laws of the United States." In 1935 the definition was extended to include "any insured bank as defined in subsection (c) of Section 12B of the Federal Reserve Act, as amended." Thus, the statute protects not only national banks but numerous state banks scattered throughout the United States.

robbery was committed by the use of a dangerous weapon or device, and Section 3 authorized stiffer punishment, including death if the verdict of the jury so directed, for murder or kidnapping in the course of a bank robbery, or in avoiding arrest, or in escaping from arrest or confinement for such robbery.

In 1937, at the request of the Attorney General, Congress amended "the bank-robbery statute to include burglary and larceny." Title of 1937 Act, 50 Stat. 749. The two new federal crimes, burglary and larceny of a bank, were placed in the same subdivision as robbery. A burglar was defined as one "who shall enter or attempt to enter any bank, or any building used in whole or in part as a bank, with intent to commit in such bank or building, or part thereof, so used, any felony or larceny, * * *" The same punishment was ordered for both burglary and robbery. Larceny was divided into two grades: Stealing from the bank anything of value exceeding fifty dollars was made a felony and stealing anything of less value, a misdemeanor. The two classes of larceny were defined in the following terms:

> "* * * whoever shall take and carry away, with intent to steal or purloin, any property or money or any other thing of value exceeding $50 belonging to, or in the care, custody, control, management, or possession of any bank, shall be fined not more than $5,000 or imprisoned not more than ten years, or both; or whoever shall take and carry away, with intent to steal or purloin, any property or money or any other thing of value not exceeding $50 belonging to, or in the care, custody, control, management, or possession of any bank, shall be fined not more than $1,000 or imprisoned not more than one year, or both."

The Bank Robbery Act was clearly aimed only at three offenses committed against banks in which the United

States has an interest. There was no attempt to enact a comprehensive criminal code covering all crimes against the banks. For example, the commission of arson and fraud against banks was not made a federal offense. The control of these and other crimes was left to the states. This, of course, was recognition of the fundamental principle that suppression of crime is primarily the responsibility of the state and local law-enforcement officers, and that Congress should interfere with traditional state functions only when and to the extent necessary. See pp. 19-20, *infra*.

The lower court took the position, already noted, that Congress went beyond offenses directed against the banks themselves and intended to punish entry with intent to commit any state or federal felony without limitation (R. 4, 7-8). Although the Government states that there is no occasion to decide whether entries with intent to commit state felonies not affecting the financial condition of a bank are also included, since the petitioner's offense, if within the statute, would affect the financial condition of the Bank (Br. pp. 9, 32), nevertheless it contends that the phrase "any felony" plainly and naturally means both state and federal felonies without limitation (Br. pp. 9-11, 29).

It is obvious, we think, that the statute must be directed at acts which affect the protection, preservation and efficiency of the banks. The power of Congress to enact legislation creating and punishing crimes in or against national and insured banks is not unlimited. *Cf. McCulloch* v. *Maryland*, 4 Wheat. 316, 421-23. Congress has no general police power over the nation. Criminal legislation concerning banks must be reasonably related to the protection, preservation and efficiency of banks in which the Government of the United States has some interest. *Westfall* v. *United States*, 274 U. S. 256, 258-59.

Congress recognized these limitations. As pointed out above, the entire Bank Robbery Act is aimed only at crimes

against the banks. Even robbery and larceny are not federal crimes merely because the persons whose money is taken happen to be in a protected bank at the time. The legislative history of the 1937 amendment to the Act, discussed more fully below, dispels any doubt on this score. The Attorney General requested amendment of the Bank Robbery Act to include "burglary and larceny of a bank," and the committees reported proposed legislation to add "larceny and burglary of the banks protected by this statute." H. Rep. No. 732, 75th Cong., 1st Sess.; S. Rep. No. 1259, 75th Cong., 1st Sess. Having taken deliberate precautions to punish offenses committed against banks and to enact an amendment to prohibit burglary "of" banks, Congress surely could not have intended burglary to cover entry with intent to commit any felony whatever upon bank premises, whether or not directed at the bank.[4] Indirection or subtlety should not be imputed to Congress in the definition of federal crimes. Penal statutes must be obvious and definite on their face. *United States* v. *Cohen Grocery Co.*, 255 U. S. 81; *Lanzetta* v. *New Jersey*, 306 U. S. 451.

B. On the Face of the Statute, the Phrase "Any Felon," Clearly Refers to Federal Felonies Affecting the Banks.

In creating the three crimes of bank robbery, burglary and larceny, Congress demonstrated on the face of the statute that it alone would define them. Nowhere is there the slightest indication that state law was to control or apply to any element of those crimes.

---

[4] Federal felonies which would not be offenses against banks include conspiracies to defraud the United States, Crim. Code, Sec. 37, 18 U. S. C. Sec. 88; sale of narcotics, 38 Stat. 786, as amended, 44 Stat. 1023, 1382, 26 U. S. C. Sec. 2553; violation of the Mann Act, 36 Stat. 825, 18 U. S. C. Sec. 398. Felonies under state laws which would not be offenses against the banks, include rape and adultery. Entry into a national or insured bank, with intent to commit any of those felonies, could not possibly affect the bank; it is not the kind of entry which could be called burglary of the bank.

The background is significant. In 1934 Congress spelled out exactly what it meant by robbery. It certainly had no intention of incorporating state law with respect to robbery. In 1937 Congress amended the act by adding burglary and larceny. Again it stated each element of the two offenses. Larceny was fully defined. State law on larceny is immaterial. Burglary, too, is self-sufficient, except for the words "any felony or larceny." The "larceny" undoubtedly meant is larceny as defined in the same subsection.[5] Here again no resort to state law is intended. Section 2(a) would be completely self-contained, except for the words "any felony" in the definition of burglary. But these derive meaning from other portions of the Bank Robbery Act and other federal penal statutes.

The Bank Robbery Act is but one of many criminal laws enacted by Congress. It must be considered part and parcel of the body of federal penal laws. Since "felony" in the statute of 1937 is unqualified, the obvious place to seek its content is in the same or other related Congressional Acts. *Conyer v. United States*, 80 F. (2d) 292, 294 (C. C. A. 6) ("felony" in Espionage Act refers to any felony under the laws of the United States); *United States v. Kraus*, 270 Fed. 578, 582 (S. D. N. Y.). See also *Collins v. McDonald*, 258 U. S. 416, 419-20. "Federal law • • • is found in the federal Constitution statutes, or common law." Jackson, J., in *D'Oench, Duhme & Co. v. F. D. I. C.*, 315 U. S. 447, at 471-72.

In some statutes Congress has defined various offenses and denominated them felonies or misdemeanors. See, *e. g.* Rev. Stat. Sec. 5209, as amended, 40 Stat. 972, 49 Stat. 704, 712; 12 U. S. C. Sec. 592. But in others Congress has pre-

[5] But see *United States v. Patton*, 120 F. (2d) 73 (C. C. A. 3), discussed *infra*, Point II, where the court held that "larceny" in the statute means larceny at common law. This, however, is not larceny under state law.

scribed the punishment, without stating whether the crime created was a felony or a misdemeanor. Section 2(a) is itself an example. For violation of any of its provisions, except the theft of any property, money or other thing of value not exceeding fifty dollars, the penalty is fixed at imprisonment for more than one year. Each violation so punishable is a felony by reason of Section 335 of the Federal Criminal Code, 18 U. S. C. Sec. 541 (Appendix A, *infra*, p. 30, which provides that all offenses (under federal law) which may be punished by death or imprisonment for a term exceeding one year, shall be deemed felonies, and all others shall be deemed misdemeanors.[6] Thus if a federal statute declares the offense created a felony or a misdemeanor, it is unnecessary to look further. If the statute is silent, it must be considered in connection with Section 335 of the Federal Criminal Code to see whether the crime is a felony. In either event, if the offense is felonious, the next inquiry is whether it is a felony affecting the bank. See pp. 8-11, *supra*. If the answer is affirmative, then and then only is there a felony within the meaning of the Bank Robbery Act.

---

[6] The Government states emphatically that Section 335 of the Criminal Code is a classification, not a definition of felonies. See Gov. Br. pp. 29-31. This Court in *Bannon* v. *United States*, 156 U. S. 464, at 468, and *Redgan* v. *United States*, 157 U. S. 301, at 303, thought that statutes like Section 335 are statutory definitions of "felony". Whether it is one or the other, is immaterial. The fact of the matter is that Section 335 of the Criminal Code determines what Federal offenses (not specifically named by Congress as felonies or misdemeanors) are federal felonies, just as Section 8750 of the *Vermont Public Laws* (1933), entitled "Definitions," determines what Vermont offenses are Vermont felonies. Apparently the Government would use Section 8750 to define "felony" in a federal statute, but would use Section 335—Congress' own conception of felony—"chiefly . . . in applying certain statutes specifying a different procedure for felony trials . . ." Gov. Br. pp. 30-31. But Section 335 must certainly be used in connection with statutes defining federal offenses to determine the meaning of "felony," not only in Section 287 of the Judicial Code, which the Government cites, but also in statutes like 18 U. S. C. Sec. 612, and the Bank Robbery Act.

There can be little doubt that the meaning of the phrase "any felony" must be found in federal statutes. Compare *Seaboard Air Line Railway* v. *Horton*, 233 U. S. 492, 503, in which the Court held that by the phrase in the Federal Employers' Liability Act of April 22, 1908, "any statute enacted for the safety of employees," Congress meant only federal, not state statutes enacted for the safety of employees. The second clause of Section 2(a) of the Bank Robbery Act, the other provisions of the Act and all other federal laws dealing with felonies which may affect banks are in *pari materia*, because they relate to the same matter —felonious crimes against national or insured banks. These must be considered together. *United States* v. *Freeman*, 3 How. 556, 564; *Moore* v. *Chesapeake & Ohio Ry.*, 291 U. S. 205, 210; *United States* v. *Stewart*, 311 U. S. 60, 64. This done, the phrase "any felony" assumes the meaning intended by Congress. Robbery is a federal felony affecting the bank.[7] Another federal felony affecting banks besides robbery which would be included in "any felony" may be found in the National Stolen Property Act, 48 Stat. 794, as amended 53 Stat. 1178 (18 U. S. C. Secs. 413-19, especially Sec. 416). Still others are felonies affecting banks created by Congress in later legislation, as, for example, the concealment, storage or other disposition of property in violation of Section 2(c). Entry into a bank with intent to rob it or to pledge or sell securities in violation of the National Stolen Property Act or to place in a safety deposit property

[7] Under the Bank Robbery Act, larceny of more than $50.00 from the bank is a federal felony. But it is expressly covered by "any felony or larceny." The lower court thought that larceny was undefined in the Act (R. 5), even though it had previously stated that one of the purposes of the 1937 amendment was to add "larceny" to the Act. R. 4. The fact that the meaning of "larceny" is to be found in federal law without reference to state law naturally leads to the same conclusion as to the companion word "felony."

taken from another bank by robbery or larceny, would be entry with intent to commit the type of felony included in the Bank Robbery Act. See also 12 U. S. C. Secs. 596-97.

Moreover, in construing other federal statutes, the courts of the United States have held that the meaning of "felony" must be found in the laws of Congress, never in those of the states unless Congress expressly adopts them. The leading case is *United States* v. *Coppersmith*, 4 Fed. 198 (C. C. W. D. Tenn.). The statute involved was Section 819 of the Revised Statutes (now Jud. Code, Sec. 287, 28 U. S. C. Sec. 424) which provided:

> "When the offense charged is treason or a capital offense, the defendant shall be entitled to twenty and the United States to five peremptory challenges. On the trial of *any other felony*, the defendaant shall be entitled to ten and the United States to three peremptory challenges * * *". (Italics supplied.)

One of the defendant's contentions was that the term "felony" should be given the meaning it had acquired in American law by force of state legislation. 4 Fed. at 198, 203. The court refused to apply state laws, stating that it would do so only if Congress *adopted* them. At the time Congress had not enacted Section 335 of the Criminal Code. The court summarized its construction of the statute as follows (4 Fed. at 207):

> " * * * the clause under consideration may operate, in other than capital cases, to give the defendant 10 challenges in the following classes of cases: *First*, where the defense [*sic*] is declared by statute, expressly or impliedly, to be a felony; *second*, where congress does not define an offense, but simply punishes it by its common-law name, and at common law it is a felony; *third*, where congress adopts a state law as to an offense, and under such law it is a felony."

This rule of construction has been approved again and again.[8]

Congress has repeatedly sanctioned these views in numerous statutes. When it desires to incorporate state penal provisions, it does so by specific reference or adoption. Many of the statutes are collected in Appendix B, *infra*, pp. 32-36. For example, by the Act of July 7, 1898, 30 Stat. 717, as amended, 35 Stat. 1145 (18 U. S. C. Sec. 468), which deals with lands over which the Federal Government has jurisdiction, but which are within the territorial limits of the states, Congress provided that if a person does or omits to do an act which is not made penal by any of its own laws, but which "if committed or omitted within the jurisdiction of the State * * * in which such place is situated, *by the laws thereof now in force would be penal*, shall be deemed guilty of a like offense and be subject to a like punishment * * *." (Italics supplied.) The lower court construed the Bank Robbery Act as if it had the italicized language. In the light of the established practice of Congress, the omission of specific reference or adoption of state laws is very significant evidence that Congress did not intend to include felonies under state law.[9] It is familiar law that a statute should not be given an extended mean-

---

[8] *United States* v. *De Quilfeldt*, 5 Fed. 276, 279 (C. C. W. D. Tenn.); *United States* v. *Daubner*, 17 Fed. 793, 794-5 (E. D. Wis.); *In re Wilson*, 18 Fed. 33, 34 (E. D. Mich.); *United States* v. *Falkenheimer*, 21 Fed. 624, 627 (C. C. D. Mo.); *Considine* v. *United States*, 112 Fed. 342, cert. denied, 184 U. S. 699; *Hallock* v. *United States*, 185 Fed. 417, 424 (C. C. A. 8), cert. denied, 220 U. S. 613. See also *United States* v. *Baugh*, 1 Fed. 784, 788 (E. D. Va.): "Under the federal laws nothing is felony unless expressly so declared to be by Congress, with exception of capital offences." See *Bannon* v. *United States*, 156 U. S. at 468; *Reagan* v. *States*, 157 U. S. at 303.

[9] The Government cites several statutes to show that Congress has often built upon state law. Gov. Br. pp. 15-16. Several expressly refer to state law. Those which do not, prohibit the transportation of "stolen" property. But the word "stolen" does not import state law. It has a common-law or popular significance, and there is therefore no need to refer to state law. *Russell* v. *United States*, 119 F. (2) 686, 688 (C. C.

ing when it "would have been easy to say so" if the legislature had intended that meaning.[10] *Farrington* v. *Tennessee*, 95 U. S. 679, 689; *United States* v. *Mangus*, 33 F. Supp. 596 (N. D. Ind.). In this case the failure to refer to state law is conclusive, first, because the definition of burglary is complete and effective without the importation of state felonies and, secondly, because Congress specifically rejected the 1934 bill which expressly adopted felonies under the laws fo the states. See pp. 19-20, *infra*.

The statute, on its face, is clearly directed at federal felonies against national and insured banks. The statute requires no aid from state statutes, and it certainly does not incorporate them by reference or by any other means, except possibly by implication. It is well settled, however, that penal statutes should not be expanded by construction, but should be strictly construed in favor of the accused. They cannot be extended by inference to acts which are not clearly within their terms. *Todd* v. *United States*, 158 U. S. 278, 282; *United States* v. *Gradwell*, 243 U. S. 476, 485; *Pasulo* v. *United States*, 272 U. S. 620, 629; *United States* v. *Resnick*, 299 U. S. 207, 209.

In its brief (p. 10), the Government has cited a number of cases holding that the "words 'any felony' had been used for the purpose of describing both state and federal felonies in state statutes dealing with such matters as punishment of habitual criminals, disbarment of attorneys and fitness to hold public office." But these cases are distinguishable. Moreover, they run counter to the well-established practice of Congress and to the settled construction of federal statutes.

A. 8); *United States* v. *Cohen*, 274 Fed. 596, 597 (C. C. A. 3); *Crabb* v. *Zerbst*, 99 F. (2d) 562, 565 (C. C. A. 5); *United States* v. *Trinder*, 1 F. Supp. 659, 660 (D. Mont.). Also, see R. 11, n. 3.

[10] See also *National Bank* v. *Matthews*, 98 U. S. 621, 627; *Railroad Company* v. *Grant*, 98 U. S. 398, 403; *United States* v. *Chase*, 135 U. S. 255, 259; *Commissioner* v. *Beck's Estate*, 129 F. (2d) 243, 245 (C. C. A. 2).

The state statutes dealing with disbarment of attorneys and fitness to hold office are wide of the point. The issue there is whether the attorney or public officer should continue to exercise functions of public trust. Any violation of law, whether state or federal, is inconsistent with the oath taken to uphold the laws and constitutions of the United States and of the State, and demonstrates unfitness for the high trust reposed in him by the court or the people. Construction of statutes of this kind should be liberal; they are remedial, not criminal. The state statutes on habitual offenders are more nearly penal, although it should be noticed that they do not create or define crimes, but only the punishment. They are not precedents, however, because they specifically refer to felonies in other jurisdictions.[11]

C. The Legislative History of the Bank Robbery Act Shows that Congress Did Not Intend to Include State Felonies.

In 1934 the Attorney General submitted a bill which would have accomplished the purpose which the lower court would

[11] The Kansas statute in *State* v. *Merriweather*, 136 Kan. 377, provides that increased punishment for second or third conviction of felony may be based up "former convictions for felony committed by the prisoner, in or out of the State." *Kan. Gen. Stat.* (1935) Sec. 21-107(a). The next section states that "Every person who shall have been convicted in any of the United States, or in any District or Territory thereof, or in a foreign country, of an offense which if committed in this state would be punishable by the laws of this state by confinement and hard labor, shall upon conviction for any subsequent offense within the state be subject to the punishment herein prescribed upon subsequent convictions, in the same manner and to the same extent as if such first conviction had taken place in a court of this state." *Kan. Gen. Stat.* (1935) Sec. 21-108. See also *People* v. *Bigelow*, 94 Cal. App. 28. The Texas Court in *Arnold* v. *State*, 127 Tex. 89, justified consideration of a prior conviction of a federal felony on the ground that the federal felony was denounced *as a felony by the Texas statutes* and that the conviction was secured in a Federal court in the State of Texas. In effect, this was construing the Texas act as if it read like the Kansas statute.

attribute to the 1937 amendment. Congress refused to enact the bill.

The Attorney General's bill (S. 2841, 73d Cong. 2d Sess.) was passed by the Senate with minor amendments. 78 Cong. Rec. 5738; see S. Rep. No. 537, 73d Cong., 2d Sess. Section 2 made it unlawful to take and carry away, or attempt to take and carry away, anything of value belonging to or in the care of any national bank without its consent or with its consent obtained by trick, artifice, fraud or false or fraudulent representation, with intent to convert to the use of anyone other than the bank. Section 3 prohibited breaking or attempting to break into any bank, "with intent to commit • • • any felony under any law of the United States or under any law of the State, District, Territory, or possession where such building is located • • •."[12] The remainder of the bill was substantially Sections 2, 3 and 4 of the 1934 Act.

The House Committee on the Judiciary, of which Representative Hatton Sumners was chairman, amended the bill by striking out all of Sections 2 and 3. See H. Rep. No. 1461, 73d Cong. 2d Sess. No explanation was given by the committee either in its report or on the floor of the House. The probable explanation is that Sections 2 and 3 made unnecessary inroads upon the functions of the states. The Attorney General, in submitting the bill, had announced that crimes by organized groups of gangsters who moved "rapidly from the scene of one crime of violence to another across state lines" could not be adequately controlled by the states and that federal intervention and legislation were necessary, "limited to the functions which probably can be

[12] This was the customary method of incorporating state law. See p. 16, *supra*. It is significant that the Attorney General was aware of that fact in 1934 and that he did not say "with intent to commit • • • any felony." Yet the lower court and the Government consider the two expressions interchangeable!

efficiently performed only by some central agency." 78 Cong. Rec. 2947. Sections 2 and 3 would have brought within federal jurisdiction all cases in which money was taken fraudulently and in which there had been a breaking into the bank with intent to commit any one of the innumerable felonies under federal and state law. This went far beyond the needs announced by the Attorney General; Representative Sumners "sought throughout the session to confine extensions of federal power to those situations where the need to supplement state and local law enforcing agencies had become imperative." Note, 1 LAW & CONTEMP. PROB. 445, 448-49.

The bill as amended by the Committee was passed by the House, 78 Cong. Rec. 8132, and was submitted to a committee of conference which recommended that the Senate agree to the amendments of the House. See H. Rep. 1598, 73d Cong. 2d Sess. Thereafter the conference report was accepted by both houses, and the bill became law on May 18, 1934.

In 1937 the Attorney General whose proposal had initiated the 1934 Act submitted, and Representative Sumners introduced (81 Cong. Rec. 2731), a bill to amend Section 2(a) of the Bank Robbery Act so as to include burglary and larceny. The original proposal read as follows:

> "* * * whoever shall enter or attempt to enter any bank, or any building used in whole or in part as a bank, with intent to commit in such bank or building, or part thereof, so used, *any larceny or other depredation;* or whoever shall take or carry away, with intent to steal or purloin, any property or money or any other thing of value belonging to, or in the care, custody, control, management, or possession of any bank, * * *." (Italics supplied.)

In his letter of transmittal, the Attorney General asserted that exclusion of larceny and burglary from the statute had

led to incongruous results. He gave us as example the case of a man who had gained possession of $11,000 of a national bank's funds during the absence of one of the employees but could not be prosecuted under the Act because he had not displayed any force and put anyone in fear. He concluded that the bill as drafted would include within the prohibitions of the statute "the crimes of burglary and larceny of a bank covered by its provisions." (Quoted in H. Rep. No. 732, 75th Cong., 1st Sess.)

The House Committee amended the bill by substituting "any felony or larceny" for "any larceny or other depredation." *Id.* No explanation was given. The only other change in the bill was with respect to the punishment for larceny. Because of objections to the failure to distinguish between robbery and "breaking and entering" to commit larceny on the one hand, and simple larceny on the other (81 Cong. Rec. 4656), the committee offered an amendment which provided the following punishments (*id.* 5376-77):

1. Robbery and burglary: fine of not more than $5,000 or imprisonment of not more than 20 years, or both.

2. Larceny of over $50: fine of not more than $5,000 or imprisonment of not more than 10 years, or both.

3. Larceny not exceeding $50: fine of not more than $1,000 or imprisonment of not more than one year, or both.

With these amendments and with at least some Congressmen under the impression that the bill defined burglary as "breaking and entering," the House passed the bill. The Senate accepted it without question or discussion. 81 Cong. Rec. 5409, 9198, 9331. The bill became law on August 24, 1937. 50 Stat. 749, c. 747.[13]

---

[13] The lower court attached some significance to the amendment in 1940, making it a crime to "receive, possess, conceal, store, barter, sell, or dispose of any property, knowing it to have been taken from a bank in violation of subsection (a) * * *." 54 Stat. 695, adding (c) to Sec-

The Government's conclusion that the legislative history reflects the desire of Congress to include both state and federal felonies (Br. p. 11 *et seq.*) is startling. In 1934 Congress rejected the bill proposed by the Attorney General, which included "any felony. * * * under any law of the State * * *." In 1937 the same Attorney General recommended a bill which contained no reference to felonies under state law. (He undoubtedly remembered Congressional objection to the too wide scope of his 1934 proposal.) The phrase "larceny or other depredation," apparently taken from Section 192 of the Criminal Code (18 U. S. C. Sec. 315), in no way depended upon state law.[14] The House Committee which substituted "felony" for "depredation" made no specific reference to state laws. As we have shown above, unless there is express adoption of state law, the meaning of "felony" must be found in federal law. The conclusion is inevitable that no one who had anything to do with the 1937 bill thought that it would adopt the penal provisions of forty-eight states with respect to acts committed in national and insured banks.

The purpose of the Attorney General, approved and adopted by the House and Senate Committees, was to avoid incongruous results, not to achieve them. He was interested in federal prosecution of burglars and thieves. He

---

tion 2. It thought subsection (c) would be "sadly limited," if the burglary clause were construed to include only federal felonies. See R. 6. There are at least two answers: (1) Subsection (c) will surely apply to property taken from the bank by robbery or larceny. (2) The court overlooked the nature of the crime of burglary. The offense is complete when there has been an entry with the requisite intent. Commission of the felony intended is unnecessary. *Cf.* 4 BLACKSTONE COMM. 227-28; 1 HALE P. C. 561-62. Hence subsection (c) must have been aimed at receivers of property taken in the course of robbery or larceny in violation of subsection (a). See H. Rep. No. 1668, 76th Cong., 3d Sess.

[14] When this Court construed "depredation," (as used in the Postal Laws and Regulations), it referred to the Century Dictionary, not to laws of the locality. *Deal* v. *United States*, 274 U. S. 277, 283.

wanted to punish those who stole away with $11,000 of the bank's money. These ends are attained by construing "felony" as felony under Congress' own statutes. In expanding that term to include state felonies, the lower court and the Government attribute to the Attorney General and Congress extravagant purposes. In 1937 neither would have said that the bill was directed at a man who gave the bank his own note for $500 with a forged endorsement, or a check for $42.50 with insufficient funds on deposit (*Hudspeth* v. *Melville*, 127 F. (2d) 373), or a forged check for $119 (*Hudspeth* v. *Tornello*, 128 F. (2d) 172). These are not the crimes with which state authorities had become unable to cope and with respect to which the need to supplement state and local law had become imperative. Nor are they crimes whose omission in 1934 had led to incongruous results. Moreover, if these were offenses which the Federal Government should prosecute, it would have been very simple to make them federal crimes.[15] In effect the Government is seeking to introduce by way of the burglary clause the fraud provisions rejected by Congress in 1934. It was unsuccessful in its efforts to accomplish this result by charges of larceny or entry with intent to commit larceny. *United States* v. *Patton*, 120 F. (2d) 73 (C. C. A. 3); *United States* v. *Mangus*, 33 F. Supp. 596 (N. D. Ind.)

Nor does construction of "felony" as federal felony reduce the burglary clause "to a mere prohibition against attempts to commit robbery or larceny" (Gov. Br. p. 26). The burglary is complete upon entry with the intent to rob, steal or do acts prohibited by the National Stolen Property Act or Section 2(c) of the Bank Robbery Act. There is no attempt to rob or steal if the intent is immeditely aban-

[15] The awkward and irrational results of the construction by the lower court are effectively described by Judge Frank in his dissent. See R. 13-14.

doned upon entry into the bank, without taking further steps toward translating the intent into action coming close to perpetration of robbery or larceny. *People* v. *Thomas*, 63 Cal. 482; see WHARTON, CRIMINAL LAW (10th ed.) Sec. 181. Furthermore, even if the attempt were complete upon entry, the burglary clause would be needed for attempts to commit larceny or acts prohibited by Section 2(c) of the statute or by the National Stolen Property Act (18 U. S. C. Sec. 416). Congress has not prohibited attempts to commit these three types of federal felonies. In any event, if the robbery or larceny or other felony is completed, prosecution for that offense is not a bar to prosecution for burglary. *Morgan* v. *Devine*, 237 U. S. 632; *Carpenter* v. *Hudspeth*, 112 F. (2) 126 (C. C. A. 10), cert. denied, 311 U. S. 683; *Territory* v. *Willard*, 8 Mont. 328; *cf. Ebeling* v. *Morgan*, 237 U. S. 625; *Albrecht* v. *United States*, 273 U. S. 1, 11; *United States* v. *Noveck*, 273 U. S. 202, 206.

Finally, the legislative history is said to reflect a purpose and pattern of building upon state and common law [18] to complement state enforcement (Gov. Br. pp. 11-13, 16-17, 20, 26-29; *cf.* R. 4-5). No doubt, Congress did intend to supplement local enforcement where the state, county and municipal officials were unable to cope with the criminals. See H. Rep. No. 1461, 73d Cong., 2d Sess., p. 2; *cf.* 78 Cong. (Rec. 2947). There never was any showing that state authority had become so feeble as to require Federal aid in dealing with minor frauds. But Congress clearly had no intention of building on state law, for it rejected the bill which specifically adopted the felony provisions of the

---

[18] Both the lower court and the Government have lumped state and common law indiscriminately. See R. 4-5; Gov. Br. 16-17, 26-28. But the common law concept of intent to commit a felony is vastly different from the statutory modifications now in force in most states. See Point II, *infra*, pp. 26-28.

states and three years later enacted a statute which omitted any reference to state law.

Congress itself defined the offenses under Federal law. There is no need to look at state law to determine whether there has been robbery, burglary or larceny of a national bank. Congress has provided that a bank has been robbed when anyone "by force and violence, or by putting in fear, feloniously takes * * * from the person or presence of another" property belonging to or in the possession of the bank; that larceny has occurred when someone has taken and carried away, "with intent to steal or purloin," property belonging to or in the possession of the bank; that burglary has been committed by entry into the bank, with intent to commit "any felony or larceny." Larceny is defined in the same statute. Felony is not, but the Bank Robbery Act itself contains two felonious offenses against banks (Section 2(a), (c)) and other federal statutes create and punish more felonies against banks. How can it be said that Congress has built upon state law? What can the law of Vermont supply? Certainly, it cannot change the elements of robbery or larceny, and there is no reason to suppose that Congress built upon state law in only one clause—that defining burglary. Sections 8400-01 of the Vermont Public Laws (1933) confine robbery to taking from the person. Nothing is said about taking from the "presence of another." Nor is the omission cured by considering these two sections with Section 8442, since the crime under that section, larceny from the person, is separate and distinct from robbery and does not require violence or putting in fear. Section 8440 defines grand larceny (a felony) as the stealing of property exceeding twenty-five dollars in value. Under the Federal statute larceny of twenty-five dollars to fifty dollars is a misdemeanor. Burglary under the state penal code is quite different from

burglary in the Bank Robbery Act. Under Sections 8436-37, burglary consists of breaking and entering into places in which personal property, the subject of larceny, is situated "with intent to commit murder, rape, robbery, larceny or other felony." Surely Congress did not build upon the law of Vermont or any other state.[17]

II. The Bank Robbery Act requires entry with intent to commit a common-law felony affecting the bank.

As stated above, we suggest, in the alternative, that if "felony" is not to be construed as felony under federal law, the term should be given its common-law meaning. This suggestion accepts the Government's contention that in "case of doubt * * * the common law background of such phrases as 'with intent to commit * * * any felony' furnishes a better guide to the proper interpretation of the statute than any distinction between state crimes and federal." Gov. Br. p. 17. It may be that Congress may have had the intention of building upon the common law and that "it retained in the definition of the offense [burglary] the classic element of entry with intent to commit a felony." Gov. Br. p. 27. But if this be true, the "classic element" should be accorded "classic" significance. Entry with intent to utter a forged endorsement is not within the common-law conception of entry with intent to commit a felony, because the uttering was a misdemeanor at common law. See p. 6, *supra*. At common law only murder, manslaughter, arson, burglary, robbery, rape, sodomy, mayhem and larceny were felonies. See WHARTON,

[17] Nor could it have built the offense of burglary of banks upon the law of New Jersey, which classifies crimes as misdemeanors and high misdemeanors. *United States* v. *Slutzky*, 79 F. (2) 504 (C. C. A. 3). Uttering a promissory note with a forged endorsement is a "high misdemeanor," not a "felony." *N. J. Rev. Stat.* (1937) Sec. 2: 132-1b. *See United States* v. *Nickerson*, D. N. J., No. 864C, decided Nov. 30, 1942, which the Government has appealed or intends to appeal to this Court.

CRIMINAL LAW (10th ed.) Sec. 22; CLARK AND MARSHALL, CRIMES (3d ed.) Sec. 3.

This view of the statute is not without plausibility.[18] In *United States* v. *Patton*, 120 F. (2) 73 (C. C. A. 3), the court held that "larceny" in the burglary clause of the Bank Robbery Act should be given its common-law meaning because it believed that "larceny" was not defined in the statute. It applied the well-settled principle that (120 F. (2) at 75) "when a Federal statute uses a term known to the common law to designate a common law offense and does not define the term, courts called upon to construe it should apply the common law meaning." See, *e. g.*, *United States* v. *Palmer*, 3 Wheat. 610, 630, 640, 643 (robbery); *United States* v. *Smith*, 5 Wheat. 153, 160 (robbery, murder); *Harrison* v. *United States*, 163 U. S. 140, 142 (rob); *Oliver* v. *United States*, 230 Fed. 971, 973 (C. C. A. 9); cert. denied, 241 U. S. 670 (rape); *Levinson* v. *United States*, 47 F. (2) 470 (C. C. A. 6) (forge). See nn. 8, 9, *supra*.

The term "felony" had a well-defined meaning at common law. It referred to the crimes of murder, manslaughter, arson, burglary, robbery, rape, sodomy, mayhem and larceny. These were the serious offenses punishable by death, or by forfeiture of the lands or goods of the offender. The Court has recognized that as the common-law meaning of felony. See *Ex parte Wilson*, 114 U. S. 417, 423; *Bannon* v. *United States*, 156 U. S. 464, 467-8; *Reagan* v. *United States*, 157 U. S. 301, 303.

If the Court should decide that Congress has not sufficiently defined "felony" for all purposes under Federal law, it should accord the word the meaning it possessed at common law. If this be done, the indictment does not charge an offense known to the laws of the United States, since the petitioner did not enter the national bank at Burlington, Vermont, with intent to commit a common-law

[18] The District Court of New Jersey has held that "any felony" means any common-law felony. *United States* v. *Nickerson*, cited p. 17, *supra*.

felony. As pointed out above, utterance of a promissory note with a forged endorsement was, at most, a misdemeanor at common law.

Conclusion.

For the reasons above state, it is respectfully submitted that the indictment does not charge an offense within the meaning of the Bank Robbery Act and the judgment below should be reversed.

JOHN T. SAPIENZA,
Counsel for Petitioner.

January 1943.

APPENDIX A.

The Act of May 18, 1934, c. 304, 48 Stat. 783, as amended by the Act of August 23, 1935, c. 614, 49 Stat. 720, the Act of August 24, 1937, c. 747, 50 Stat. 749, and the Act of June 29, 1940, c. 455, 54 Stat. 695, 12 U. S. C. (Secs. 588(a) and 588(b)), provides as follows:

* * * as used in this Act the term "bank" includes any member bank of the Federal Reserve System, and any bank, banking association, trust company, savings bank, or other banking institution organized or operating under the laws of the United States and any insured bank as defined in subsection (c) of Section 12B, of the Federal Reserve Act, as amended.

Sec. 2. (a) Whoever, by force and violence, or by putting in fear, feloniously takes, or feloniously attempts to take, from the person or presence of another any property or money or any other thing of value belonging to, or in the care, custody, control, management or possession of, any bank; or whoever shall enter or attempt to enter any bank, or any building used in whole or in part as a bank, with intent to commit in such bank or building, or part thereof, so used, any felony or larceny, shall be fined not more than $5,000 or imprisoned not more than twenty years, or both; or whoever shall take and carry away, with intent to steal or purloin, any property or money or any other thing of value exceeding $50 belonging to, or in the care, custody, control, management, or possession of any bank, shall be fined not more than $5,000 or imprisoned not more than ten years, or both, or whoever shall take and carry away, with intent to steal or purloin, any property or money or any other thing of value not exceeding $50 belonging to, or in the care, custody, control, management or possession of any bank, shall be fined not more than $1,000 or imprisoned not more than one year, or both.

(b) Whoever, in committing, or in attempting to commit, any offense defined in subsection (a) of this section, assaults any person, or puts in jeopardy the life of any person by

the use of a dangerous weapon or device, shall be fined not less than $1,000 nor more than $10,000 or imprisoned not less than five years nor more than twenty-five years, or both.

(c) Whoever shall receive, possess, conceal, store, barter, sell or dispose of any property or money or other thing of value knowing the same to have been taken from a bank in violation of subsection (a) of this section shall be fined not more than $5,000 or imprisoned not more than ten years, or both.

Sec. 3. Whoever, in committing any offense defined in this Act, or in avoiding or attempting to avoid apprehension for the commission of such offense, or in freeing himself or attempting to free himself from arrest or confinement for such offense, kills any person, or forces any person to accompany him without the consent of such person, shall be punished by imprisonment for not less than 10 years, or by death if the verdict of the jury shall so direct.

Sec. 4. Jurisdiction over any offense defined by this Act shall not be reserved exclusively to courts of the United States."

Subsection (c) of Section 12B of the Federal Reserve Act, as amended by the Act of August 23, 1935, c. 614, 49 Stat. 684 (12 U. S. C. Sec. 264(c)) defines "insured bank" as follows:

"The term 'insured bank' means any bank the deposits of which are insured in accordance with the provisions of this section; * * *"

Section 335 of the Federal Criminal Code, Act of March 4, 1909, c. 321, 35 Stat. 1152, as amended by the Act of December 16, 1930, c. 15, 46 Stat. 1029 (18 U. S. C. Sec. 541), defines felonies under federal law.

"All offenses which may be punished by death or imprisonment for a term exceeding one year shall be deemed felonies. All other offenses shall be deemed misdemeanors. * * *"

Sections 8484-85 of the Public Laws of Vermont (1933) define utterance of forged or counterfeited instruments as follows:

"Sec. 8484. *Papers, documents, etc.* A person who wittingly, falsely, and deceitfully makes, alters, forges or counterfeits, or wittingly, falsely or deceitfully causes to be made, altered, forged or counterfeited, or procures, aids, or counsels the making, altering, forging, or counterfeiting, of a writ, process, public record, or any certificate, return or attestation of a clerk of a court, public register, notary public, justice or other public officer, in relation to a matter wherein such certificate, return or attestation may be received as legal proof, or a charter, deed, or any evidence or muniment of title to property, will, testament, bond or writing obligatory, letter of attorney, policy of insurance, bill of lading, bill of exchange, promissory note, or an order drawn on a person or corporation, or on a state, county or town or school district treasurer, for money or other property, or an acquittance or discharge for money or other property, or an acceptance of a bill of exchange, or endorsement or assignment of a bill of exchange or promissory note, for the payment of money, or any accountable receipt for money, goods or other property, or certificate of stock, with intent to injure or defraud a person, shall be imprisoned in the state prison not more than ten years and fined not more than one thousand dollars.

"Sec. 8485. *Uttering Forged or Counterfeited Instrument.* A person who utters and publishes as true a forged, altered or counterfeited record, deed, instrument or other writing mentioned in the preceding section, knowing the same to be false, altered, forged or counterfeited, with intent to injure or defraud a person, shall be imprisoned in the state prison not more than ten years and fined not more than one thousand dollars."

Section 8750 of the Public Laws of Vermont (1933) defines felonies under Vermont law.

"Sec. 8750. *Definitions.* Offenses which may be punished by death or imprisonment in the state prison are felonies; all other offenses are misdemeanors."

APPENDIX B.

Federal Criminal Provisions Dependent Upon State Law.[1]

1. Act of March 3, 1917, 39 Stat. 1069, as amended March 4, 1917, 39 Stat. 1202; February 24, 1919, 40 Stat. 1151 (18 U. S. C. Sec. 341). Repealed June 25, 1936.

"No letter, postal card, circular, newspaper, pamphlet, or publication of any kind containing any advertisement of spirituous, vinous, malted, fermented, or other intoxicating liquors of any kind * * * shall be deposited in or carried by the mails of the United States * * * when addressed or directed to any person, firm, corporation, or association, or other addressee, at any place or point in any State or Territory of the United States, or the District of Columbia, at which it is *by the law in force in the State* or Territory or the District of Columbia at that time unlawful to advertise or solicit orders for such liquors, or any of them, respectively."

2. Act of May 25, 1900, 31 Stat. 188, as amended March 4, 1909, 35 Stat. 1137 (18 U. S. C. Sec. 392).

"It shall be unlawful for any person to deliver to any common carrier for transportation, or for any common carrier to transport from any State, Territory, or District of the United States, to any other State, Territory or District thereof, any foreign animals or birds, the importation of which is prohibited, or the dead bodies or parts thereof of any wild animals or birds, where such animals or birds have been killed or shipped *in violation of the laws of the State*, Territory or District in which the same were killed, or from which they were shipped."

3. Act of May 18, 1934, 48 Stat. 782 (18 U. S. C. Sec. 408e).

"It shall be unlawful for any person to move or travel in interstate or foreign commerce from any State, Territory,

[1] The italics used in this appendix do not appear in the original.

or possession of the United States, or the District of Columbia, with intent either (1) to avoid prosecution for murder, kidnapping, burglary, robbery, mayhem, rape, assault with a dangerous weapon, or extortion accompanied by threats of violence, or attempt to commit any of the foregoing, *under the laws of the place* from which he flees, or (2) to avoid giving testimony *in any criminal proceedings in such place* in which the commission of a felony is charged."

4. Act of July 7, 1898, 30 Stat. 717, as amended March 4, 1909, 35 Stat. 1145 (18 U. S. C. Sec. 468).

"Whoever, within the territorial limits of any State, organized Territory, or District, but within or upon any of the places now existing or hereafter reserved or acquired, described in Section 451 of this Title, shall do or omit the doing of any act or thing which is not made penal by any law of Congress, but which if committed or omitted within the jurisdiction of the State, Territory or District in which such place is situated, *by the laws thereof now in force would be penal*, shall be deemed guilty of a like offense and be subject to a like punishment; and *every such State*, Territorial or District *law* shall, for the purposes of this Section, continue in force, notwithstanding any subsequent repeal or amendment thereof by any such State, Territory or District."

5. Act of March 4, 1909, 35 Stat. 1151, as amended June 19, 1937, 50 Stat. 304 (18 U. S. C. Sec. 542).

"The manner of inflicting the punishment of death shall be the manner prescribed *by the laws of the State* within which the sentence is imposed."

6. Act of February 2, 1903, 32 Stat. 793, as amended March 4, 1909, 35 Stat. 1151 (18 U. S. C. Sec. 549).

"The District Courts of the United States for the District of South Dakota shall have jurisdiction to hear, try, and determine all actions and proceedings in which any person shall be charged with the crime of murder, manslaughter, rape, assault with intent to kill, assault with a

dangerous weapon, arson, burglary, or larceny committed within the limits of any Indian reservation in the State of South Dakota. * * * Any person convicted of the crime of assault with intent to kill, assault with a dangerous weapon, or larceny, committed within the limits of any such reservation, shall be subject to the same punishment as is provided in cases of other persons convicted of any of said crimes *under the laws of the State of South Dakota.*"

7. Act of June 11, 1932, 47 Stat. 301 (18 U. S. C. Sec. 622a).

"For the purpose of cooperating with States * * * in the care and treatment of juvenile offendors, whenever any person under 21 years of age shall have been arrested, charged with the commission of any crime punishable in any court of the United States or of the District of Columbia, and, after investigation by the Department of Justice, it shall appear that such person has committed a criminal offense or is a delinquent *under the laws of any State* that can and will assume jurisdiction over such juvenile and will take him into custody and deal with him *according to the laws of such State* * * * the United States Attorney of the District in which such person has been arrested is authorized to forego the prosecution of such person and surrender him as herein provided."

8. Act of June 25, 1910, 36 Stat. 821 (18 U. S. C. Sec. 722).

"Whenever any person has been convicted of any offense against the United States which is punishable by imprisonment, and has been sentenced to imprisonment and is confined therefor, in any reformatory institution of any State in accordance with Section 705 of this Title, or other laws of the United States, then if such State has laws for the parole of prisoners committed to such institutions by the courts of that State, such person convicted of any offense against the United States shall be eligible to parole on the same terms and conditions and by the same authority and subject to recommittal for violation of such parole in the same manner, as persons committed to such institutions by

the courts of said State, and *the laws of said State* relating to the parole of prisoners and the supervision thereof in such institutions are hereby adopted and made to apply to persons committed to such institutions for offenses against the United States."

9. Act of March 1, 1913, 37 Stat. 699. This act has been repealed.

"That the shipment or transportation, * * * of any spirituous, vinous, malted, fermented, or other intoxicating liquor of any kind, from one State, Territory or District of the United States, * * * into any other State, Territory or District of the United States * * * which said spirituous, vinous, malted, fermented, or other intoxicating liquor is intended, by any person interested therein, to be received, possessed, sold, or in any manner used, either in the original package or otherwise, *in violation of any law of such State*, Territory or District of the United States * * * is hereby prohibited."

10. Act of Feb. 22, 1935, 49 Stat. 31 (15 U. S. C. Sec. 715b).

"The shipment or transportation in interstate commerce from any State of contraband oil (defined as 'petroleum which * * * was produced * * * in excess of the amounts permitted to be produced * * * *under the laws of a State* * * *') produced in such State is hereby prohibited. * * *"

11. Act of June 25, 1936, 49 Stat. 1928 (27 U. S. C. Sec. 223).

"(a) Whoever shall import, bring, or transport any intoxicating liquor into any State in which all sales (except for scientific, sacramental, medicinal, or mechanical purposes) of intoxicating liquor containing more than 4 per centum of alcohol by volume are prohibited, otherwise than in the course of continuous interstate transportation through such State, or attempt so to do, or assist in so doing, shall: (1) If such liquor is not accompanied by such permit or permits, license or licenses therefor as are now or here-

after required *by the laws of such State;* or (2) if all importation, bringing, or transportation of intoxicating liquor into such State is prohibited *by the laws thereof;* be guilty of a misdemeanor and shall be fined not more than $1,000 or imprisoned not more than one year, or both.

(b) In order to determine whether anyone importing, bringing, or transporting intoxicating liquor into any State, or anyone attempting so to do, or assisting in so doing, is acting in violation of the provisions of this chapter . . . the definition of intoxicating liquor contained *in the laws of such State* shall be applied, but only to the extent that sales of such intoxicating liquor except for scientific, sacramental, medicinal, and mechanical purposes) are prohibited in such State."

FILE COPY

Office - Supreme Court U. S.
FILED
JAN 6 1943
CHARLES ELMORE CROPLEY
CLERK

No. 325

In the Supreme Court of the United States

OCTOBER TERM, 1942

JEROME PARKER JEROME, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES

INDEX

	Page
Opinions below	1
Jurisdiction	1
Question presented	2
Statute involved	2
Statement	4
Summary of argument	5
Argument:	
A person who enters a bank with intent to commit an offense against the financial condition of the bank which is felonious under state law is guilty of entering with intent to commit "any felony or larceny" within the meaning of the Bank Robbery Act	7
1. The plain meaning of the words prevents restricting Section 2 (a) to federal felonies	9
2. The purpose and pattern of the Bank Robbery Act, as reflected in its legislative history, show that Congress used the words "any felony" in their natural meaning to comprehend both state and federal felonies	11
Conclusion	38
Appendix "A"	39
Appendix "B"	41

CITATIONS

Cases:	
Abraham v. *United States*, 15 F. (2d) 911	16
Ackerson, Matter of, 218 App. Div. (N. Y.) 388	10
Alford v. *United States*, 113 F. (2d) 885	21, 27
Arnold v. *State*, 127 Tex. Cr. 89	10
Biggs, Ex parte, 52 Ore. 433	10
Commonwealth v. *Porter*, 242 Ky. 561	10
Conley, In re, 188 Minn. 575	10
Doherty v. *United States*, 94 F. (2d) 495, certiorari denied, 303 U. S. 658	9
Donnelley v. *United States*, 276 U. S. 505	37
Ebbs, In the Matter of, 150 N. C. 44	10
Fasulo v. *United States*, 272 U. S. 620	37
Finch, In re, 156 Wash. 609	10
Franklin v. *United States*, 216 U. S. 559	33, 34

Cases—Continued. Page

Hudspeth v. *Melville*, 127 F. (2d) 373 ..... 8, 35

Hudspeth v. *Tornello*, 128 F. (2d) 172, now pending on petition for a writ of certiorari, No. 163 ..... 3, 8, 33, 34, 35

Kerl, In re, 32 Idaho 737 10

Kirby, In re, 10 S. D. 322 10

Misner, In re, 133 Kan. 789 10

O'Connell, In re, 184 Cal. 584 10

Peters, In re, 73 Mont. 284 10

Seitz v. *State Medical Board*, 24 Ohio App. 154 10

State ex rel. Anderson v. *Fousek*, 91 Mont. 448 10

State ex rel. Beckman v. *Bowman*, 38 Ohio App. 237 10

State v. *Merriweather*, 136 Kan. 337 10

State ex rel. Sorensen v. *Scoville*, 123 Neb. 457 10

United States v. *Classic*, 313 U. S. 299 ..... 33, 34

United States v. *Corbett*, 215 U. S. 233 ..... 9, 37

United States v. *Giles*, 300 U. S. 41 37

United States v. *Gilliland*, 312 U. S. 86 37

United States v. *Lacher*, 134 U. S. 624 37

United States v. *Paul*, 6 Pet. 141 33

United States v. *Raynor*, 302 U. S. 540 37

United States v. *Walter*, 263 U. S. 15 9

Westfall v. *United States*, 274 U. S. 256 9

Statutes:

Act of July 7, 1898, c. 576, 30 Stat. 717, (subsequently Section 289 of the Criminal Code) 33

Bank Robbery Act (Act of May 18, 1934, c. 304, 48 Stat. 783, as amended by Act of August 23, 1935, c. 614, § 323, 49 Stat. 729, and Act of August 24, 1937, c. 747, 50 Stat. 749; 12 U. S. C. 588a–588d) 3, 28, 23, 35

Sec. 1 3

Sec. 2 (a) 2, 5, 7, 9, 26, 27, 35, 36

Sec. 2 (b) 36

Sec. 3 36

Sec. 4 14

Connally Act, 15 U. S. C. 715b 15

Criminal Code:

Sec. 192 (18 U. S. C. 315) 21

Sec. 335 (18 U. S. C. 541) 29, 30

Federal Firearms Act, 15 U. S. C. 902 (e) and 902 (g) 16

Fugitive Felon Act, 18 U. S. C. 408e 15

Judicial Code, Sec. 287 (28 U. S. C. 424) 31

Liquor Enforcement Act of 1936, 27 U. S. C. 223 (6) 15

National Cattle Theft Act, Pub. No. 217, 77th Cong., 1st sess. (August 18, 1941) Sec. 3 15

National Motor Vehicle Theft Act of 1919, 18 U. S. C. 408 16

National Stolen Property Act, 18 U. S. C. 415 14

	Page
Public Laws of Vermont (1933):	
Sec. 8485	4
Sec. 8750	4
Revised Statutes, Sec. 5209 (as amended by the Act of September 26, 1918, c. 177, §7, 40 Stat. 972; 12 U. S. C. 588)	11, 25
Miscellaneous:	
1934 Bank Robbery Bill (78 Cong. Rec. 5738)	39
78 Cong. Rec. 2946	17
78 Cong. Rec. 5738	11, 17, 39
78 Cong. Rec. 8432-8133, 8264, 8322, 8775, 8776, 8778, 8856, 8857	17
81 Cong. Rec. 2731	22
81 Cong. Rec. 4656, 5376-5377, 9331	24
H. R. 5900, 75th Cong., 1st sess.	22
H. Rep. 732, 75th Cong., 1st sess.	18, 28, 41
H. Rep. No. 1461, 73d Cong., 2d sess.	11, 13, 17
H. Rep. No. 1598, 73d Cong., 2d sess.	17
1 Law and Contemporary Problems (1934) 445	18
Millet, *Criminal Law* (1934)	21, 25, 27
S. 2811, 73d Cong., 2d sess.	11, 13, 14, 17
S. Rep. No. 10, Part 1, 69th Cong., 1st sess., pp. 12-13	30
S. Rep. No. 537, 73d Cong., 2d sess.	11, 17
S. Rep. No. 1259, 75th Cong., 1st sess.	23

In the Supreme Court of the United States

OCTOBER TERM, 1942

No. 325

JEROME PARKER JEROME, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The majority (R. 1–8) and dissenting (R. 9–17) opinions in the circuit court of appeals are reported at 130 F. (2d) 514.

JURISDICTION

The judgment of the circuit court of appeals was entered August 3, 1942 (Tr. 65[1]). The peti-

[1] The reference "Tr." is to the stenographic transcript which accompanied the petition for a writ of certiorari. The Court granted petitioner's motion for leave to proceed *in*

tion for a writ of certiorari was filed August 21, 1942 and was granted October 12, 1942 (R. 17–18). The jurisdiction of this Court rests upon Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether a person who enters a bank with intent to commit an offense against the financial condition of the bank which is felonious under state law but not under federal law is guilty of entering with intent to commit "any felony or larceny" within the meaning of the Bank Robbery Act.[2]

STATUTE INVOLVED

Section 2 (a) of the Act of May 18, 1934, c. 304, 48 Stat. 783, as amended by the Act of August 24, 1937, c. 747, 50 Stat. 749 (12 U. S. C. 588b (a)), commonly called the Bank Robbery Act, reads as follows:

> Whoever, by force and violence, or by putting in fear, feloniously takes, or feloni-

---

forma pauperis (R. 17) and only the opinions in the court below are contained in the printed portion of the transcript of record. References to this portion of the record are indicated by the letter "R.".

[2] This question is also presented in *Tornello* v. *Hudspeth*, No. 163, now pending on a motion for leave to proceed *in forma pauperis* and a petition for a writ of certiorari to the Circuit Court of Appeals for the Tenth Circuit, in which the Government has filed a memorandum opposing the granting of the petition.

ously attempts to take, from the person or presence of another any property or money or any other thing of value belonging to, or in the care, custody, control, management, or possession of, any bank;* or whoever shall enter or attempt to enter any bank, or any building used in whole or in part as a bank, with intent to commit in such bank or building, or part thereof, so used, any felony or larceny, shall be fined not more than $5,000 or imprisoned not more than twenty years, or both; or whoever shall take and carry away, with intent to steal or purloin, any property or money or any other thing of value exceeding $50 belonging to, or in the care, custody, control, management, or possession of any bank, shall be fined not more than $5,000 or imprisoned not more than ten years, or both; or whoever shall take and carry away, with intent to steal or purloin, any property or money or any other thing of value not exceeding $50 belonging to, or in the care, custody, control,

* Defined in Section 1 of the Act of May 18, 1934, c. 304, 48 Stat. 783, as amended by Section 333 of the Act of August 23, 1935, c. 614, 49 Stat. 684, 720 (12 U. S. C. 588a), as including "any member bank of the Federal Reserve System, and any bank, banking association, trust company, savings bank, or other banking institution organized or operating under the laws of the United States and any insured bank as defined in subsection (c) of section 12B of the Federal Reserve Act, as amended [*i. e.*, any bank the deposits of which are insured by the Federal Deposit Insurance Corporation]."

management, or possession of any bank, shall be fined not more than $1,000 or imprisoned not more than one year, or both.

STATEMENT

Petitioner was indicted under Section 2 (a) of the Bank Robbery Act, as amended (*supra*, p. 2), for entering the Howard National Bank and Trust Company of Rutland, Vermont, a national bank and a member of the Federal Reserve System, with intent to utter a forged promissory note and thereby to defraud the bank (Tr. 2, 5–6). To utter a forged promissory note is a felony under the law of Vermont.* Petitioner was convicted after trial before a jury (Tr. 32), and he was sentenced to imprisonment for one year and a day (Tr. 33).

On appeal the court below affirmed the conviction (Tr. 65), holding that the words "any felony" in the second clause of Section 2 (a) of the Bank Robbery Act penalizing entering a bank

---

*Section 8485 of the Public Laws of Vermont (1933) provides: "A person who utters and publishes as true a forged, altered or counterfeited record, deed, instrument or other writing mentioned in the preceding section [including a promissory note or any endorsement or assignment of a note], knowing the same to be false, altered, forged or counterfeited, with intent to injure or defraud a person, shall be imprisoned in the state prison not more than ten years and fined not more than one thousand dollars." Section 8750 provides: "Offenses which may be punished by death or imprisonment in the state prison are felonies; all other offenses are misdemeanors."

with intent to commit "any felony or larceny," include offenses which are felonious under state law (R. 1–8). Circuit Judge Frank dissented; he was of the opinion that the words should be limited to offenses which are felonies under federal law and affect the banks covered by the statute (R. 9–17).[1]

SUMMARY OF ARGUMENT

The language of Section 2 (a) in its natural meaning plainly interdicts the conduct charged in the indictment. Without limitation it prohibits entering a bank "with intent to commit . . . any felony." The all-embracing words "any felony" indicate a deliberate purpose to exclude the very contention which petitioner now makes.

In enacting the Bank Robbery Act the prime purpose of Congress was to protect banks in which the Federal Government has an interest. From this point of view any distinction between entries with intent to commit federal felonies and entries with intent to commit state felonies was quite irrelevant, and to impose such a limitation by construction would defeat the broad remedial purpose of the Act. The clause now in question was added to the Bank Robbery Act in 1937, upon

[1] Since petitioner does not question the sufficiency of the evidence to support the conviction, it is unnecessary to delineate the proof adduced at the trial. The evidence, however, is summarized in the opinion of the circuit court of appeals (R. 1–2).

the recommendation of the Attorney General, for the express purpose of including "within its prohibitions, the crimes of burglary and larceny of a bank * * *." Petitioner's construction would partially defeat this specific purpose, for many felonies against a bank, which one might break into the bank to commit, are not independent offenses under federal law.

It was also the purpose to build upon state law and to complement but not supersede state law enforcement. This pattern had been developed in many statutes enacted contemporaneously with the Bank Robbery Act. There was therefore no reason to distinguish in the definition of burglary between state and federal felonies in order to avoid superseding state law enforcement activities. On the contrary, the pattern required avoidance of any such demarcation.

The Act was drafted against a background of common law and state statutory definitions of crime. Hence it is probable that Congress used the classic phrase "with intent to commit * * * any felony" with its common significance. This inference is confirmed by the legislative history. The original burglary section proposed by the Attorney General in 1934 expressly proscribed breaking into a bank with intent to commit any felony, state or federal. The burglary clause recommended by the Attorney General in 1937 to remedy the defect created by the failure of Congress to enact a burglary clause in 1934 would have proscribed

entering "with intent to commit * * * any larceny or other depredation", a definition under which it would plainly have been irrelevant whether the depredation was independently punishable under state or federal law. Congress amended this draft to substitute "with intent to commit * * * any felony or larceny." The classic purpose of requiring proof of an intent to commit a felony in burglary prosecutions is to distinguish burglary from unlawful entries which were lesser crimes. Consequently, Congress must be assumed to have used the classic words "any felony" rather than the unfamiliar phrase "any depredation" in order to limit the burglary clause of the statute to entries with intent to commit serious offenses. There is no reason to suppose that Congress intended for the first time without comment to use the words for the unfamiliar purpose of importing a distinction between state and federal offenses.

ARGUMENT

A PERSON WHO ENTERS A BANK WITH INTENT TO COMMIT AN OFFENSE AGAINST THE FINANCIAL CONDITION OF THE BANK WHICH IS FELONIOUS UNDER STATE LAW IS GUILTY OF ENTERING WITH INTENT TO COMMIT "ANY FELONY OR LARCENY" WITHIN THE MEANING OF THE BANK ROBBERY ACT

Petitioner's sole contention is that he did not "enter any bank * * * with intent to commit * * * any felony or larceny" within the meaning of Section 2 (a) of the Bank Robbery Act,

because the felony which he intended to commit is a felony by state law only and not by federal law. He advances two alternative interpretations of that clause. The first is that "any felony" refers only to the other felonies, robbery and grand larceny, interdicted by Section 2 (a). This interpretation was approved by Judge Huxman in his dissenting opinion in *Hudspeth* v. *Tornello*, 128 F. (2d) 172 (C. C. A. 10), now pending on petition for a writ of certiorari as No. 163, this Term. The second interpretation suggested by petitioner is that the phrase refers to those felonies under federal statutes which affect the banks covered by the Act. This second interpretation was approved by Judge Frank in his dissenting opinion in the court below (R. 164).

The Circuit Court of Appeals for the Tenth Circuit and the court below have both rejected the contention made by petitioner and have held that the words "any felony" include offenses under the law of the state in which the bank is located. The two courts have differed somewhat, however, in interpreting the Act. In *Hudspeth* v. *Melville*, 127 F. (2d) 373 (C. C. A. 10), and *Hudspeth* v. *Tornello*, *supra*, the Circuit Court of Appeals for the Tenth Circuit limited the scope of the phrase "any felony" to "acts committed in a national bank and having relation to the protection, preservation and efficiency of such bank, which constitute a felony under the laws of the state in which the bank is situated" (127 F. (2d),

at 376). The court below apparently went further and interpreted the phrase to cover all felonies, state and federal, whether or not directed against the bank (R. 8).

We submit that both courts were correct in rejecting the two restrictive interpretations urged by petitioner. Since petitioner intended to defraud the bank by uttering a forged note, there is no occasion to decide whether entries with intent to commit other state felonies not affecting the financial condition of a bank are also included.[6]

1. The plain meaning of the words prevents restricting Section 2 (a) to federal felonies

When taken according to its ordinary and natural meaning, the language of the second clause of Section 2 (a) plainly interdicts the act charged in the indictment. The second clause without limitation prohibits entering a bank "with intent to commit in such bank * * * *any* felony or larceny".[7] The words do not suggest that Congress, which was concerned with the protection of banks in which the federal government has an interest, considered it material whether the felony

[6] There can be no doubt of the power of Congress to enact appropriate legislation to punish state felonies affecting the financial condition of banking institutions organized or operating under the laws of the United States. *Westfall* v. *United States*, 274 U. S. 256; *Doherty* v. *United States*, 94 F. (2d) 495 (C. C. A. 8), certiorari denied, 303 U. S. 658; cf. *United States* v. *Walter*, 263 U. S. 15.

[7] Italics supplied.

was proscribed by state law or by federal. Indeed, the use of the all-embracing words "*any* felony" indicates a deliberate purpose to exclude the very contention which petitioner makes. Cf. *United States* v. *Corbett*, 215 U. S. 233, 241. There was good precedent for such usage. The words "any felony" had been used for the purpose of describing both state and federal felonies in state statutes dealing with such matters as punishment of habitual criminals,[8] disbarment of attorneys,[9] and fitness to hold public office.[10]

---

[8] *E. g.*, *Arnold* v. *State*, 127 Tex. Cr. 89, 94 (1934). See, also, *State* v. *Merriweather*, 136 Kan. 337, 339 (1932).

[9] *In re O'Connell*, 184 Cal. 584 (1920); *In re Kerl*, 32 Idaho 737, 741–742 (1920); *In re Minner*, 133 Kan. 789, 790–793 (1931); *Commonwealth* v. *Porter*, 242 Ky. 561, 563 (1932); *In re Conley*, 188 Minn. 575, 576 (1933); *In re Peters*, 73 Mont. 284, 287 (1925); *State ex rel. Sorensen* v. *Seaville*, 123 Neb. 457, 459 (1932); *Matter of Ackerson*, 218 App. Div. (N. Y.) 388, 390–392 (1926); *In re Kirby*, 10 S. D. 322, 328 (1897); *In re Finch*, 156 Wash. 609 (1930). Contra: *In the Matter of Ebbs*, 150 N. C. 44, 46–51 (1908) (see, however, the dissenting opinions of Brown, J., and Clark, C. J., at pp. 58–62); cf. *Ex Parte Biggs*, 52 Ore. 433, 436 (1908), holding that the felony need not be one under the laws of Oregon, but it must be known to Oregon law.

[10] E. g., *State ex rel. Anderson* v. *Foysek*, 91 Mont. 448, 454–455 (1932). Compare *Seitz* v. *State Medical Board*, 24 Ohio App. 154, 158–159 (1926), holding that, under a statute providing for the revocation of a physician's certificate for conviction of "a felony", the word includes a violation of the federal narcotic laws. And in *State ex rel. Beckman* v. *Bowman*, 38 Ohio App. 237, 240–242 (1930), the court held that, under a provision establishing pensions for policemen who, after having served fifteen consecutive years, are discharged

2. The purpose and pattern of the Bank Robbery Act, as reflected in its legislative history, show that Congress used the words "any felony" in their natural meaning to comprehend both state and federal felonies.

Prior to 1934, robbery, larceny, burglary, and other cognate offenses directed against banks organized or operating under federal law were punishable only under state law. Federal law protected such banks merely against embezzlement and kindred offenses by officers, directors, agents, and employees (R. S. § 5209, as amended by the Act of September 26, 1918, c. 177, § 7, 40 Stat. 972; 12 U. S. C. 592). In 1933 other offenses against banks reached such proportions as to give rise to requests from all sections of the country for federal protection against gangsters operating from one state to another, a situation with which local authorities were frequently unable to cope.[11]

In 1934, in response to this situation, the Attorney General recommended a bill (S. 2841, 73d Cong., 2d sess.) to create a number of new federal offenses.[12] Section 1 defined the term "bank" as

"for any offense other than * * * being convicted of a felony", the word "felony" embraced the federal felony of conspiracy.

[11] See H. Rep. 1461, p. 2, and S. Rep. No. 537, 73d Cong., 2d sess.

[12] The text of the bill as passed by the Senate (78 Cong. Rec. 5738) did not differ materially from the Attorney General's draft. The Senate bill is copied in Appendix "A", pp. 39-40, *infra*.

including banks organized or operating under federal law, and member banks of the Federal Reserve System. Section 2 made it a felony to take or attempt to take money or property belonging to or in the possession of a bank, either without its consent or with its consent when such consent was induced by fraud. Section 3 penalized breaking into or attempting to break into a bank with intent to commit "any offense defined by this act or any felony under any law of the United States or under any law of the State, District, Territory, or possession" in which the bank is located. Section 4 (a) prohibited the forcible taking or attempted taking, from the person or presence of another, of any money or property belonging to or in the possession of a bank, and subsection (b) provided an increased penalty if, in the commission of the offense, any person should be assaulted or placed in jeopardy of his life by the use of a dangerous weapon. Section 5 imposed a minimum penalty of ten years' imprisonment and a maximum penalty of death upon any one who, in committing any offense defined in the bill, or in seeking to avoid apprehension, or attempting to escape after arrest, should kill or kidnap any person. The sixth and last section provided that jurisdiction over offenses defined by the bill should "not be reserved exclusively to courts of the United States."

Although this bill was modified in Congress (see pp. 17–18, *infra*), it is important to emphasize its

purpose and pattern; for in our view they have brought about the evolution of the Act into its present form and show the restricted interpretations advocated by the petitioner to be contrary to the intention of Congress.

First. The prime purpose was to extend federal protection to banks theretofore protected only by state laws. From this point of view any distinction between state and federal felonies was entirely irrelevant. Thus, in proscribing breaking into a bank with intent to commit a felony, there was no reason to distinguish between an intent to commit a felony under state law and an intent to commit a federal felony. In either case there was an offense against the bank, and a need and occasion for federal intervention. Consequently, the Attorney General's draft interdicted breaking into a bank building "with intent to commit * * * any offense defined by this act or any felony under any law of the United States or under any law of the State * * * where such building is located".

Second: It was also the purpose to build upon state law and to complement state enforcement, rather than to create a series of novel crimes coming under the exclusive jurisdiction of the federal government. In recommending the bill the Attorney General explained (H. Rep. No. 1461, 73d Cong., 2d sess., p. 2):

> There is no intention that the Federal Government shall supersede the state authorities in this class of cases. It will intervene only to cooperate with local forces when it is evident that the latter cannot cope with the criminals.

And Section 6 (Section 4 as finally enacted) provided that "Jurisdiction over any offense defined by this Act shall not be reserved exclusively to courts of the United States" (48 Stat. 783; 12 U. S. C. 588d).

This being the pattern of the bill, there was no reason to limit the offenses created so as to avoid superseding state law enforcement activities. On the contrary, the pattern required avoiding any demarcation between state and federal crimes in order that the authorities might carry on joint investigations and prosecute in either state or federal courts regardless of the details of the crime committed, thus avoiding the chance that criminals would escape through gaps or conflicts between state and federal power. Sections 2, 3, 4 and 5 of the Attorney General's draft reflected the plan in the definitions of the crimes, especially Section 3 which, as we have shown, expressly interdicted burglary of a bank regardless of whether the intended felony was state or federal.

Other federal criminal laws enacted during the same period also emphasize the fact that those in charge of the federal program of law enforcement had formulated a pattern of complement-

ing state law."[12] The legislation was built upon state law and used the fact that the person or goods entered into commerce as the occasion for the exercise of federal power to supplement state authority. It was natural, therefore, in the Bank Robbery Act to use the fact that the state offense was against a bank in which the federal government had an

---

[12] National Stolen Property Act, 18 U. S. C. 415:

"Whoever shall transport or cause to be transported in interstate or foreign commerce any goods, wares, or merchandise, securities, or money, of the value of $5,000 or more theretofore stolen * * *, knowing the same to have been so stolen * * * shall be punished * * *."

National Cattle Theft Act, Pub. No. 217, 77th Cong., 1st sess. (August 18, 1941), Sec. 3:

"Whoever shall transport * * * in interstate or foreign commerce any cattle, knowing the same to have been stolen, shall be punished * * *."

Fugitive Felon Act, 18 U. S. C. 408e:

"It shall be unlawful for any person to move or travel in interstate or foreign commerce from any State, Territory, or possession of the United States, or the District of Columbia, with intent either (1) to avoid prosecution for murder, kidnaping, burglary, robbery, mayhem, rape, assault with a dangerous weapon, or extortion accompanied by threats of violence, or attempt to commit any of the foregoing, under the laws of the place from which he flees, or (2) to avoid giving testimony in any criminal proceedings in such place in which the commission of a felony is charged. * * *"

Liquor Enforcement Act of 1936, 27 U. S. C. 223 (a):

"Whoever shall import, bring, or transport any intoxicating liquor into any State in which all sales * * * of intoxicating liquor containing more than 4 per centum of alcohol by volume are prohibited * * * shall * * * be guilty * * *."

Connally Act, 15 U. S. C. 715b:

"The shipment or transportation in interstate commerce from any State of contraband oil [defined as 'petroleum

interest as the occasion for the exercise of federal power. And it is unlikely that one building upon this pattern would draw a distinction between entry into a bank with intent to commit a federal felony and entry with intent to commit a state felony.

Third. It is significant that the bill was drafted with common law and state offenses in mind. This appears clearly in the definitions of larceny,

---

which * * * was produced * * * in excess of the amounts permitted to be produced * * * under the laws of a State * * *"] produced in such State is hereby prohibited. * * *"

Federal Firearms Act, 15 U. S. C. 902 (e), 902 (g):

902 (e). "It shall be unlawful for any person who is under indictment or who has been convicted of a crime of violence [defined as 'murder, manslaughter, rape, mayhem, kidnaping, burglary, housebreaking; assault with intent to kill, commit rape, or rob; assault with a dangerous weapon, or assault with intent to commit any offense punishable by imprisonment for more than one year'] or who is a fugitive from justice to ship, transport, or cause to be shipped or transported in interstate or foreign commerce any firearm or ammunition."

902 (g). "It shall be unlawful for any person to transport or ship or cause to be transported or shipped in interstate or foreign commerce any stolen firearm or ammunition, knowing, or having reasonable cause to believe, same to have been stolen."

See also National Motor Vehicle Theft Act of 1919, 18 U. S. C. 408:

"* * * Whoever shall transport or cause to be transported in interstate or foreign commerce a motor vehicle, knowing the same to have been stolen, shall be punished * * * *"

In *Abraham* v. *United States*, 15 F. (2d) 911, 912 (C. C. A. 8), reference was made to the law of the state to determine whether the vehicle had been "stolen."

burglary, robbery, kidnapping and murder. In case of doubt, therefore, the common law background of such phrases as "with intent to commit * * * any felony" furnishes a better guide to the proper interpretation of the statute than any distinction between state crimes and federal.

The bill drafted by the Attorney General did not become law. It passed the Senate without material change,[14] but the House Judiciary Committee struck out Section 2, punishing larceny, and Section 3, punishing burglary, and the bill was finally enacted without those sections.[15] The legislative history throws no light upon the rea-

[14] The bill recommended by the Attorney General was introduced in the Senate on February 21, 1934 (78 Cong. Rec. 2946), was reported favorably by the Judiciary Committee without material amendment (S. Rep. No. 537, 73d Cong., 2d sess.), and passed the Senate without debate (78 Cong. Rec. 5738).

[15] The House Judiciary Committee, without explanation, struck out Sections 2 and 3 and renumbered Sections 4, 5, and 6 as Sections 2, 3, and 4, respectively (H. Rep. No. 1461, 73d Cong., 2d sess., p. 1). It also recommended an amendment making the death penalty provided by Section 5 of the Senate bill discretionary with the jury (*ibid*). The bill as thus amended passed the House after only meager discussion which sheds no light on the reasons for the committee's action (78 Cong. Rec. 8132–8133). The Senate disagreed to the House amendments and requested a conference (*id.*, 8264). The House agreed to a conference but insisted on its amendments (*id.*, 8322). The committee of conference recommended that the House amendments stand (H. Rep. No. 1598, 73d Cong., 2d sess.; 78 Cong. Rec. 8776), and the bill was finally enacted in that form (78 Cong. Rec. 8775, 8776, 8778, 8856, 8857). The bill became the Act of May 18, 1934, c. 304, 48 Stat. 783.

sons for the changes but it has been suggested that they were made to confine the bill to situations in which the need to supplement local law enforcement had become imperative." But even though this objection prevented the Attorney General's draft from becoming law, we submit that the original draft and its principal features are very significant in interpreting the 1937 amendment, for that amendment was made pursuant to the same purposes and pattern that were embodied in the original draft after experience had shown that the limitations imposed by the House committee were unwise.

Between 1934 and 1937 experience proved that the elimination of the larceny and burglary sections had been unfortunate. On March 17, 1937, Attorney General Cummings submitted to the Speaker of the House a draft of a bill to amend Section 2 (a) of the 1934 act (the robbery provision) so as to include within its prohibitions the crimes of burglary and larceny. In his letter of transmittal, the Attorney General explained the purpose of the proposed amendment as follows (H. Rep. No. 732, 75th Cong., 1st sess., Appendix "B" pp. 42–43, *infra*):

---

[1] In *1 Law and Contemporary Problems* (1934) 445, 448–449, the objections to Sections 2 and 3 of the Senate bill were attributed to Representative Sumners, the chairman of the House Judiciary Committee, who, it is said, "sought throughout the session to confine extensions of federal power to those situations where the need to supplement state and local law enforcing agencies had become imperative."

> The fact that the statute is limited to robbery and does not include larceny and burglary has led to some incongruous results.
>
> • • • • • •
>
> The enclosed bill which has been drafted in this Department proposes to amend subsection (a) of section 2 • • • so as to include within its prohibitions, the crimes of burglary and larceny of a bank covered by its provisions.

The amendment proposed to punish—

> • • • whoever shall enter or attempt to enter any bank, or any building used in whole or in part as a bank, with intent to commit in such bank or building, or part thereof, so used, *any larceny or other depredation;* or whoever shall take or carry away, with intent to steal or purloin, any property or money or any other thing of value belonging to, or in the care, custody, control, management, or possession of any bank, • • •. [Italics supplied.]

Just as the prime purpose of the bill originally recommended by the Attorney General was to give banks federal protection against offenses already punishable under state law, so the specific purpose of the amendment was to add the protection against larceny and burglary, already generally punishable under state law, which Congress had previously withheld. The letter of transmittal makes this plain. But to have defined burglary to exclude entries with intent to commit offenses

not punished by federal law would have partially frustrated this purpose because many of the offenses which one might enter a bank to commit still were not punished by federal law. Doubtless it was for this reason that the proposed amendment proscribed entry with intent to commit "any larceny or other depredation," a definition under which it would have been obviously irrelevant whether the depredation was already unlawful under federal law or had been condemned by the states alone.[17]

There was no change in the pattern of the legislation between 1934 and 1937.[18] The policy of the federal government apparently continued to be one of building upon state law in order to aid and complement the states in the prevention of crime. Consequently, there was the same reason not to distinguish between state and federal felonies in the proposed 1937 amendment that had existed in 1934 (see pp. 13–16, *supra*).

---

[17] In the court below Judge Frank found the failure of the Attorney General to use the express words of his original bill to be significant, saying that the original draft contained the "obvious verbiage" if the intention was to negative any distinction between state and federal offenses (R. 10–11). But since the Attorney General in his draft plainly accomplished that purpose in other words, it seems apparent that the explanation lies in the fact that the Attorney General's draft was modeled upon Section 192 of the Criminal Code (see p. 21, *infra*).

[18] The only intervening amendment was one expanding the definition of "bank" as used in the Act to include banks insured by the Federal Deposit Insurance Corporation. See Act of August 23, 1935, c. 614, Sec. 333, 49 Stat. 684, 720.

In one respect, however, the amendment proposed by the Attorney General in 1937 did depart from the scheme of the original bill. In defining the offense of burglary the 1937 amendment did not follow the common law. The draftsman apparently took as his model Section 192 of the Criminal Code, 18 U. S. C. 315, which provides:

> Whoever shall forcibly break into or attempt to break into any post office, or any building used in whole or in part as a post office, with intent to commit in such post office, or building, or part thereof, so used, any larceny or other depredation, shall be fined * * *.

In the draft amendment of the Bank Robbery Act, he substituted the word "enter" in lieu of "forcibly break into", but otherwise he followed Section 192. This change was in line with modern definitions of burglary,[19] and establishes that the amendment was designed to cover any entry of a bank with the prescribed intent and not merely breaking and entering. *Alford* v. *United States*,

[19] "In many of the states, statutes have been passed declaring it to be burglary for a person to break into other places than a dwelling house, as for instance into warehouses, shops, railroad cars, offices, mills, barns, stables, vessels and tents. Similarly by statute in a number of states, the necessity for a breaking has been eliminated and entry alone is now sufficient, in such states, if the required intent be also present. Again in some states burglary may be committed in the daytime as well as at night, and with intent merely to commit a misdemeanor. * * *" Miller, *Criminal Law* (1934), p. 339.

113 F. (2d) 885, 887 (C. C. A. 10). But since the words "any larceny or other depredation" were retained, the change would also have had the effect of punishing as burglaries many trivial offenses which, under common law and state law, were only petty misdemeanors. It may be doubted whether the draftsman so intended but, whatever the purpose, it certainly did not make the distinction which petitioner advocates. (See p. 20, *supra*.)

It seems entirely clear, therefore, that the amendment drafted by the Attorney General followed the purposes and pattern of his original proposal and, like it, contained no distinction between state offenses and federal. Consequently, petitioner's contention must rest upon a showing that the changes made by Congress imported this distinction into the 1937 amendment for the first time and that Congress thereby abandoned the pattern upon which the entire program had been formulated. There is no suggestion of this purpose in the legislative history and, we submit, examination of the changes made by Congress shows the argument to be untenable.

The amendment recommended by the Attorney General was introduced in the House by Representative Summers (H. R. 5900, 75th Cong., 1st sess., 81 Cong. Rec. 2731) and was referred to the Committee on the Judiciary. That committee amended the clause defining burglary so that the critical phrase would read "any felony or lar-

ceny" instead of "any larceny or other depredation" (H. Rep. No. 732, 75th Cong., 1st sess.; Appendix "B", *infra*, p. 41, 43–44). No other changes were made in committee. An amendment to the larceny provision was subsequently offered on the floor of the House to distinguish between grand and petit larceny (81 Cong. Rec. 5376–5377; see also *id.*, 4656). Both amendments were adopted and, as thus amended, the bill passed the House (*id.*, 5377). In the Senate the Judiciary Committee merely adopted the House Committee's report (S. Rep. No. 1259, 75th Cong., 1st sess.) and the bill was passed without further change (81 Cong. Rec. 9331).[20]

The reason for changing the phrase "any larceny or other depredation" to "any felony or larceny" does not appear in either the committee reports or the Congressional Record. In support of his restrictive interpretation Judge Frank seems to have thought that the change was made in consequence of Representative Summers' opposition to unnecessary extension of federal power, which had caused the elimination of the larceny and burglary sections in 1934. But since the temper of the times had changed in those three years, and since it is plain that Representative Summers accepted the great part of the larceny provision, there is no reason to suppose that he sought to restrict the burglary provision to entries to com-

[20] Act of August 24, 1937, c. 747, 50 Stat. 749.

mit federal felonies. A more reasonable explanation is that the proposed draft was too harsh in punishing as burglary a peaceable entry with intent to commit any "depredation" (see pp. 20–22, *supra*) and that for this reason the House committee modified it by substituting a familiar modern definition of burglary. It is true that it nowhere appears expressly that this objection was made to the burglary clause of the Attorney General's draft, but it is significant that a similar objection was made to the larceny clause on the floor and that the committee readily proposed an amendment which was accepted. Moreover, the committee probably realized that the word "depredation" lacks any established meaning, and wished to avoid difficulties in interpretation by the use of the classic and more familiar definition of burglary as entering with intent to commit a felony. Both of these explanations are consistent with the purposes and pattern which had governed the evolution of the Act. Petitioner's explanation on the other hand would result in their partial abandonment.

First. It is plain that the prime purpose of the amendment as it was enacted was the same as that of the Attorney General in recommending it—to protect banks against larceny and burglary, thus furthering the aims of the original statute. The title of the amendatory Act was "An Act to amend the bank-robbery statute to include burg-

lary and larceny" (50 Stat. 749). The House and Senate Reports also show the same purpose (see Appendix "B", pp. 41–44, *infra*). Since the purpose of Congress and the Attorney General were the same, it is unlikely that Congress, without comment, changed the Attorney General's draft of the burglary clause in order to make the distinction between state and federal offenses which he had rejected as irrelevant.

Such a distinction, moreover, would have prevented fulfillment of the purpose to punish burglary of banks. Banks in which the federal government had an interest were (with a narrow exception [21]) protected by federal law only against robbery as defined in the 1934 Bank Robbery Act, and other common crimes against them were not covered at all by federal statutes. To have written the burglary clause to include only entries with intent to commit federal felonies therefore would have limited it narrowly. For example, if that had been done, the crime of entering a bank with intent to commit a non-federal felony such as arson, which is clearly within the purview of the common law definition of burglary,[22] would not have been punishable under the statute. In view of the prime purpose to afford banks adequate protection and the announced intention to interdict any burglary of a bank, Congress, in dealing with

---

[21] See p. 11, *supra*.

[22] Miller, *Criminal Law* (1934), pp. 323, 337–339.

burglary, must have used the comprehensive words "any felony," to include not merely the offenses of robbery and larceny defined in the other clauses of Section 2 (a), but also all other offenses against banks which are felonies under the laws of the states.

Furthermore, to have used the words "any felony" to include only federal felonies would have reduced the burglary clause to a mere prohibition against attempts to commit robbery or larceny, for under that construction the clause would in practical effect have no application unless the entry was accompanied by an intent to rob or steal. Since the Act already contained an express provision in the first clause of Section 2 (a) making attempted robbery an offense, Congress cannot have intended to restrict the wholly independent second clause to that purpose.

Second. Since the 1937 amendment did not expressly change the pattern of building upon state law and cooperating with state officials, there is no reason to suppose that Congress silently abandoned it, contrary to its established policy (see pp. 13–16, *supra*). Yet petitioner's contention can be upheld only by that conclusion, for the burglary clause as he construes it would not complement state law, but would dissociate federal law from it.

Third. As part of the pattern of building upon state offenses, the original bill defined crimes

according to the familiar common law and state statutory definitions (see pp. 16–17, *supra*). And it is significant that the House Committee changed the Attorney General's draft of the 1937 amendment to cast it in such terms. Thus, Section 2 (a) as amended proscribes in sequence, robbery, burglary, grand larceny and petit larceny. The definitions of robbery and larceny contained in the statute embody, respectively, the common law concepts of a forcible taking and a taking and carrying away with intent to steal.[23] In the case of burglary, Congress followed the state trend and departed from the common law requirement of a breaking and entering in the night-time,[24] but it retained in the definition of the offense the classic element of entry with intent to commit a felony.[25]

In this context, the classic phrase "with intent to commit * * * any felony" must be accorded its common significance. The requirement in common law and state statutory definitions of burglary that the entry be *with intent to commit a felony* was concerned with grades of offenses, distinguishing burglary from unlawful entries which were lesser crimes. In specifying such an intent in this Act, drawn as it was to operate as

---

[23] Miller, *op. cit. supra*, pp. 340–341, 362–367, 391, 392–395. See *Alford* v. *United States*, 113 F. (2d) 885, 887 (C. C. A. 10).

[24] Miller, *op. cit. supra*, 329–334, 337.

[25] *Id.*, pp. 337–339.

a complement to state law, Congress must be taken to have used that phrase for its customary purpose, thus excluding from the coverage of the burglary provision petty offenses which would have been punishable as burglaries in the draft submitted by the Attorney General) see p. 24, *supra*).[26] Nor was there reason to use a requirement of intent to commit a federal felony in order to determine whether the burglary should be punishable by the federal government and the state or by the state alone. The offense against the bank, and therefore against the federal government, would be complete with the actual or attempted entry. In the case of a forcible entry this would be admitted, we think; and the rule must be the same where the entry is peaceable.

---

[26] It is to be noted, however, that the majority below was in error when it stated that the phrase "any felony or larceny" was substituted for "any larceny or other depredation" on the floor of the House in order to meet an objection that the bill, as reported by the committee, placed simple larceny on the same plane as robbery and breaking and entering (R. 4–5). As we have pointed out (*supra*, pp. 22–23), the substitution referred to was made by the committee. The objection raised on the House floor, which the majority below referred to, was directed at the fact that the bill, as reported, made all larcenies felonious, and was the occasion for the amendment, which the House adopted, distinguishing between grand and petit larceny (see *supra*, p. 23). The error, however, does not affect the validity of the majority's suggestion for the two changes parallel each other in excluding from punishment as felonies many petty offenses included in the draft amendment recommended by the Attorney General.

For these reasons we submit that the words "any felony" must be read in their natural meaning to include any felony, whether state or federal. The limitation which petitioner would write into the Act would frustrate, at least in part, the broad purpose to protect banks and the specific purpose to punish burglaries against them. It assumes that Congress abandoned in this one clause, without explanation, the deliberate pattern of building upon state law which had pervaded all consideration of this Act and many companion statutes. Finally, it disregards the common law and state statutory background of the phrase "with intent to commit * * * any felony," as well as its context, and imports a novel distinction between intent to commit a state felony and intent to commit a federal felony, in spite of the fact that every previous draft of the burglary provision negatived any such limitation.

Moreover, the various considerations advanced by Judge Huxman and Judge Frank in their dissenting opinions dealing with the present issue seem to us upon analysis to be unpersuasive. Since they do not form any single argument, we deal *seriatim* with the points which we have not previously discussed.

1. Both Judge Huxman and Judge Frank thought that Congress referred only to federal felonies when it used the words "any felony," because it had defined a felony in Section 335 of

the Criminal Code, 18 U. S. C. 541.[27] We submit that this argument is based on a misconception of the nature and purpose of the section relied on. As the majority below said (R. 7–8), the "so-called definition" of "felony" in Section 335 is not a definition in any real sense. It merely sets up a statutory classification of federal offenses as felonies or misdemeanors according to the severity of the punishment.[28] This classification is chiefly useful in applying certain statutes specifying a different procedure for felony trials as distinguished from trials for misdemeanors, which show by their context that reference to Sec-

[27] This section provides: "All offenses which may be punished by death or imprisonment for a term exceeding one year shall be deemed felonies. All other offenses shall be deemed misdemeanors: * * *"

[28] That this was the purpose of Section 335 is apparent from the report of the Special Joint Committee on the Revision of the Laws which drafted the Criminal Code. Referring to Section 335, the Committee said (S. Rep. No. 10, Part 1, 60th Cong., 1st sess., pp. 12–13):

"Certain features have been embodied in the bill reported that characterize the whole system rather than pertain to any particular part of it. These are—

"First. The omission from the various sections of the law of the designation of the respective offenses therein denounced, as felonies or as misdemeanors, and the insertion of a general provision establishing this *classification*.

* * * * * *

"Felony as it existed at common law was distinguished as an offense carrying with it forfeiture of land and goods as a part of the punishment. This qualifying distinction disappears altogether from our criminal jurisprudence with the abolition of fines and forfeitures. It remains to-day only as

tion 335) is intended.[29] But Section 335 does not purport to define the word "felony" wherever it appears in federal statutes and should not be used for that purpose.

2. In the court below Judge Frank disapproved the majority's interpretation of the Act on the ground that it led to such "awkward" and "irrational" results as to punish an entry with intent to commit forgery (R. 13) or murder (R. 14) although there would be no federal crime if the intent were formed after the entry. But both these objections, we submit, are nothing but a suggestion that Congress might have gone further in creating federal offenses. They do not show that Congress, despite its expressions of that purpose, did not intend to punish all unlawful entries with felonious intent. And it was natural to draw the line at unlawful entries without including all offenses against banks, even though other offenses might have been included.

---

a term intended to designate 'infamous crimes' and as having some relation to certain features of *criminal procedure*. An examination of our existing statutes will reveal the fact that it is indiscriminately applied, being often affixed to an offense of lesser magnitude than others that are designated as misdemeanors, and has thus become misleading and frequently harmful by its indefinite *classification*.

"* * * Your committee has drawn the distinction between felonies and misdemeanors as follows:

"'All offenses which may be punished by death or imprisonment for a term exceeding one year shall be deemed felonies. All other offenses shall be deemed misdemeanors.'" [Italics supplied.]

[29] E. g., Judicial Code, Section 287, 28 U. S. C. 424.

Another "awkwardness" alleged to result from the majority's interpretation is that, under that interpretation, entry of a bank with intent to commit a state felony such as rape or adultery—crimes which bear no relation to the protection of banks or the currency—is made a federal offense (R. 14). It may be observed that this "awkwardness" does not suggest the necessity of distinguishing between state and federal felonies for, as the majority opinion pointed out (R. 7), there are felonies under federal law whose punishment under this Act would seem equally incongruous; the argument, therefore, goes only to show that perhaps "any felony" is meant to include only offenses against a bank. No such question, however, is present in the instant case; affirmance of the judgment below does not necessitate that the clause be interpreted to embrace *all* state felonies, irrespective of whether they affect the welfare of national banks. The state felony which the indictment charged petitioner with intent to commit—uttering a promissory note bearing a forged indorsement—was unquestionably one which affects the financial condition of a bank.[20]

---

[20] The dissenting judge also argued that the majority's interpretation does not effectuate the congressional purpose to make bank burglary a federal crime since, under that interpretation, no one can properly be indicted for burglary, "but only for entering or attempting to enter a bank with the intent to commit burglary" (R. 13). We do not understand the argument. While this clause of the statute, as we

3. It may be assumed, as was pointed out by Judge Huxman in his dissent in *Hudspeth* v. *Tornello*, 128 F. (2d) 172, 173, that under the majority opinion the law will not give the same protection to banking institutions in different states, and that the statute may vary from state to state in its application. But this would not render the Act unconstitutional. In *Franklin* v. *United States*, 216 U. S. 559, 568–569, this Court sustained the validity of Section 2 of the Act of July 7, 1898, c. 576, 30 Stat. 717 (subsequently Section 289 of the Criminal Code), which made applicable to any place over which the United States had jurisdiction the criminal laws and punishments of the state in which such place was situated.[11] And in *United States* v. *Classic*, 313 U. S. 299, it was held that where, under the law of the state, the primary election is an integral

---

have shown (*supra*, p. 21), and as the dissenting judge concedes (R. 10), clearly embraces more than burglary in the strict sense, it is clear that it is the *entry* with intent to commit a felony in the bank which constitutes the burglary.

[11] In rejecting the contention that this statute was an unconstitutional delegation to the states of authority to change the criminal laws applicable to places within the jurisdiction of the United States, the Court pointed out that the statute expressly limited the state criminal laws which were adopted by reference to those existing at the time of its enactment. We do not construe this to mean that the absence of such an express limitation from a statute of Congress adopting state laws would be fatal to the statute. In the earlier case of *United States* v. *Paul*, 6 Pet. 141, 142, cited in the *Franklin*

part of the procedure of choosing representatives in Congress, interferences with the right of qualified persons to vote in such an election and to have their votes counted are embraced within the prohibitions of Sections 19 and 20 of the Criminal Code. Neither is the variation in application a reason to suppose that Congress did not intend to proscribe entry with intent to commit a state felony. As we have pointed out (pp. 14–15, *supra*), there are many other federal penal statutes under which reference to the laws of the states is or may be necessary in order to determine their applicability.

4. The legislative history of the 1937 amendment refutes the view adopted by Judge Huxman in the *Tornello* case (128 F. (2d), at 173) that the words "any felony or larceny" mean any felony

---

case, this Court held that the effect of a statute similar to the one involved in the *Franklin* case, but which contained no limiting clause, was "limited to the laws of the several states in force at the time of its enactment." Moreover, there is, we think, a distinction between the type of statute considered in the *Franklin* case and that involved in the instant one. In the former, Congress directly adopted state penal laws as the laws of the United States, while under the latter reference is merely made to state law to determine whether a federal offense has been committed. The instant statute is similar in this respect to numerous other federal statutes to which reference has already been made (*supra*, p. 14, n. 13), the application of each of which is dependent in some degree upon the provisions of state law. See also *United States* v. *Classic*, 313 U. S. 299, 310–311, 318–319. In any event, the

or petit larceny as defined in Section 2 (a).[32] When the House Judiciary Committee amended the Attorney General's draft of the proposed amendment to Section 2 (a) by substituting the words "any felony or larceny" for "any larceny or other depredation," the bill made no distinction between grand and petit larceny. (See Appendix "B", *infra*, pp. 41, 43–44.) Under the committee's draft of the bill larceny of any money or

---

question is not present in the instant case, because the uttering of a forged promissory note was a felony under Vermont law at the time of the enactment of the amendment in 1937 making entry of a bank with intent to commit any felony a federal offense. See p. 4, n. 4, *supra*.

[32] Judge Huxman thought that only by construing the words "any felony or larceny" to mean "any of the felonies or petit larceny as herein [i. e., Section 2(a)] defined," could the requirement that criminal laws must have general application be met or the congressional intent to protect the currency be effected (128 F. (2d), at 173). However, Judge Huxman was somewhat inconsistent in his interpretation, for in his dissent in the earlier case of *Hudspeth* v. *Melville*, 127 F. (2d) 373, 377–378, he construed the term "felony" to mean *any* federal felony against a national bank or the currency.

At one point in his dissenting opinion below Judge Frank seemingly concurred in the view adopted by Judge Huxman in the *Tornello* case; he reasoned that the provisions added by the 1937 amendment of Section 2(a)—one making larceny of property exceeding $50 in value a felony and larceny of property not exceeding $50 in value a misdemeanor, and the other punishing entering or attempting to enter a bank with intent to commit any felony or larceny—"nicely correlate," the first change making stealing from a bank either a federal felony or federal petit larceny, and the second making it a

property from a bank, regardless of value, was made punishable by imprisonment for not more than twenty years, and was therefore a felony. The distinction making larceny of money or property exceeding $50 in value a felony and larceny of money or property having a lesser value a misdemeanor was made on the floor of the House (p. 23, *supra*). Hence, the committee could not have intended the word "larceny" to have the significance which Judge Huxman attached to it. On the contrary, since the committee's draft had made any larceny a felony, there was no need for the committee to include the word "larceny" at all if, by the words "any felony" it had reference only to the federal felonies defined in Section 2 (a).

---

federal crime to enter or attempt to enter a bank with intent to commit "such a federal felony or federal larceny" (R. 10). This construction is not, however, the one finally adopted by Judge Frank; in his view the proper construction is the one which Judge Huxman first adopted in the *Melville* case, i. e., that the words "any felony" mean *any* federal felony against a national bank (R. 10, 14).

Moreover, it is only reasonable to suppose that if the committee meant to refer only to the felonies defined in the section, it would have made specific reference to them. Compare Sections 2 (b) and 3 of the statute (48 Stat. 783) where, in defining aggravated degrees of the offenses listed in Section 2 (a), Congress made direct reference to them as "any offense defined in subsection (a) of this section" (Sec. 2 (b)) and "any offense defined in this Act" (Sec. 3).

5. The principle that statutes creating crimes must be strictly construed in favor of the accused has no application here. While a penal statute may not be extended to cases which are not fairly embraced within its terms, the rule does not forbid giving the words of the statute the meaning which harmonizes best with the language and context and promotes to the fullest extent the legislative policy. *United States* v. *Lacher*, 134 U. S. 624, 628, 629. As this Court said recently in *United States* v. *Raynor*, 302 U. S. 540, 552:

> * * * No rule of construction, however, requires that a penal statute be strained and distorted in order to exclude conduct clearly intended to be within its scope—nor does any rule require that the act be given the "narrowest meaning." It is sufficient if the words are given their fair meaning in accord with the evident intent of Congress. * * *

See also *United States* v. *Gilliland*, 312 U. S. 86, 93; *United States* v. *Giles*, 300 U. S. 41, 48–49; *Donnelley* v. *United States*, 276 U. S. 505, 512; *Fasulo* v. *United States*, 272 U. S. 620, 628; *United States* v. *Corbett*, 215 U. S. 233, 242. We submit that for the reasons stated our interpretation gives the statute the meaning which harmonizes with its language and context and effectuates the legislative policy, and that therefore no narrower construction is required.

CONCLUSION

It is respectfully submitted that petitioner was properly convicted and that the judgment below should be affirmed.

CHARLES FAHY,
Solicitor General.
WENDELL BERGE,
Assistant Attorney General.
ROBERT S. ERDAHL,
ARCHIBALD COX,
PHILIP R. MONAHAN,
Attorneys.

January 1943

~~NOVEMBER 1942~~.

APPENDIX "A"

The 1934 Bank Robbery Bill as it passed the Senate provided as follows (78 Cong. Rec. 5738):

Be it enacted, etc., That as used in this act the term "bank" includes any member bank of the Federal Reserve System, and any bank, banking association, trust company, savings bank, or other banking institution organized or operating under the laws of the United States.

Sec. 2. Whoever, not being entitled to the possession of property or money or any other thing of value belonging to, or in the care, custody, control, management, or possession of, any bank, takes and carries away, or attempts to take and carry away, such property or money or any other thing of value from any place (1) without the consent of such bank, or (2) with the consent of such bank obtained by the offender by any trick, artifice, fraud, or false or fraudulent representation, with intent to convert such property or money or any other thing of value to his use or to the use of any individual, association, partnership, or corporation, other than such bank, shall be punished by a fine of not more than $5,000 or imprisonment for not more than 10 years, or both.

Sec. 3. Whoever breaks into, or attempts to break into, any building or part thereof used as a place of business by any bank, with intent to commit in such building or

part thereof so used any offense defined by this act or any felony under any law of the United States or under any law of the State, District, Territory, or possession where such building is located, shall be fined not more than $5,000 or imprisoned not more than 10 years, or both.

Sec. 4. (a) Whoever, by force and violence, or by putting in fear, feloniously takes, or feloniously attempts to take, from the person or presence of another any property or money or any other thing of value belonging to, or in the care, custody, control, management, or possession of, any bank shall be fined not more than $5,000 or imprisoned not more than 20 years, or both.

(b) Whoever, in committing, or in attempting to commit, any offense defined in subsection (a) of this section, assaults any person, or puts in jeopardy the life of any person by the use of a dangerous weapon, shall be fined not less than $1,000 nor more than $10,000 or imprisoned not less than 5 years nor more than 25 years, or both.

Sec. 5. Whoever, in committing any offense defined in sections 1, 2, or 3 of this act, or in avoiding or attempting to avoid apprehension for the commission of such offense, or in freeing himself or attempting to free himself from arrest or confinement for such offense, kills any person, or forces any person to accompany him without the consent of such person, shall be punished by imprisonment for not less than 10 years, or by death.

Sec. 6. Jurisdiction over any offense defined by this act shall not be reserved exclusively to courts of the United States.

APPENDIX "B"

75th Congress, 1st Session } HOUSE OF REPRESENTATIVES { Report No. 732

AMEND THE BANK-ROBBERY STATUTE TO INCLUDE BURGLARY AND LARCENY

APRIL 30, 1937.—Referred to the House Calendar and ordered to be printed

Mr. HEALEY, from the Committee on the Judiciary, submitted the following

REPORT

[To accompany H. R. 5900]

The Committee on the Judiciary, to whom was referred the bill (H. R. 5900) to amend the bank-robbery statute to include burglary and larceny, after consideration, report the same favorably to the House with an amendment with the recommendation that, as so amended, the bill do pass.

The committee amendment is as follows:

Page 2, line 2, after the word "any" insert "felony or", and after the word "larceny" strike out "or other depredation."

The Attorney General has recommended the enactment of this proposed legislation which is designed to enlarge the scope of the bank robbery statute, enacted in 1934, (48 Stat. 783; U. S. C.,

title 12, sec. 588b) to include larceny and burglary of the banks protected by this statute. These are national banks, member banks of the Federal Reserve System, and banks insured by the Federal Deposit Insurance Corporation. Your committee concurs in this recommendation.

There is attached hereto and made a part of this report the following communication from the Attorney General to the Speaker of the House in which he explains the desirability of the proposed amendment.

"OFFICE OF THE ATTORNEY GENERAL,
Washington, D. C., March 17, 1937.

Hon. WILLIAM B. BANKHEAD,
The Speaker, House of Representatives,
Washington, D. C.

MY DEAR MR. SPEAKER: The act of May 18, 1934 (48 Stat. 783; U. S. C. title 12, secs. 588a to 588d), penalizes robbery of a national bank or a member bank of the Federal Reserve System. The class of banks protected by this statute was enlarged by section 333 of the act of August 23, 1935 (49 Stat. 720), to include all banks insured by the Federal Deposit Insurance Corporation.

The fact that the statute is limited to robbery and does not include larceny and burglary has led to some incongruous results. A striking instance arose a short time ago, when a man was arrested in a national bank while walking out of the building with $11,000 of the bank's funds on his person. He had managed to gain possession of the money during a momentary absence of one of the

employees, without displaying any force or violence and without putting any one in fear—necessary elements of the crime of robbery—and was about to leave the bank when apprehended. As a result, it was not practicable to prosecute him under any Federal statute.

The enclosed bill which has been drafted in this Department proposes to amend subsection (a) of section 2 of the above-mentioned statute so as to include within its prohibitions, the crimes of burglary and larceny of a bank covered by its provisions.

I am informed by the Acting Director of the Bureau of the Budget that this legislation is not in conflict with the program of the President and I recommend its enactment.

Sincerely yours,

HOMER S. CUMMINGS,
Attorney General."

In compliance with clause 2a of rule XIII there is printed below existing law in roman with new matter proposed to be inserted printed in italics:

"(a) Whoever, by force and violence, or by putting in fear, feloniously takes, or feloniously attempts to take, from the person or presence of another any property or money or any other thing of value belonging to, or in the care, custody, control, management, or possession of, any bank; *or whoever shall enter or attempt to enter any bank, or any building used in whole or in part as a bank, with intent to commit in such bank or building, or*

part thereof, so used, any felony or larceny; or whoever shall take or carry away, with intent to steal or purloin, any property or money or any other thing of value belonging to, or in the care, custody, control, management, or possession of any bank, shall be fined not more than $5,000 or imprisoned not more than twenty years, or both."

U. S. GOVERNMENT PRINTING OFFICE 1942

5 p 4

SUPREME COURT OF THE UNITED STATES.

No. 325.—October Term, 1942.

Jerome Parker Jerome, Petitioner, vs. The United States of America. | On Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

[February 1, 1943.]

Mr. Justice Douglas delivered the opinion of the Court.

Sec. 2(a) of the Bank Robbery Act (48 Stat. 783, 50 Stat. 749, 12 U. S. C. § 588b) provides in part that "whoever shall enter or attempt to enter any bank,[1] or any building used in whole or in part as a bank, with intent to commit in such bank or building, or part thereof, so used, any felony or larceny, shall be fined not more than $5,000 or imprisoned not more than twenty years, or both". Petitioner was indicted under that section for entering a national bank in Vermont with intent to utter a forged promissory note and thereby to defraud the bank. He was convicted after trial before a jury and was sentenced to imprisonment for one year and a day. The utterance of a forged promissory note is a felony under the laws of Vermont (P. L. 1933, § 8485, § 8750) but not under any federal statute. The Circuit Court of Appeals affirmed the conviction by a divided vote, holding that "felony" as used in § 2(a) includes offenses which are felonies under state law. 130 F. 2d 514. We granted the petition for a writ of certiorari because of the importance of the problem in the administration of justice and because of the diversity of views which have developed as respects the meaning of "felony" in § 2(a). Compare with the decision below *Hudspeth* v. *Melville*, 127 F. 2d 373; *Hudspeth* v. *Tornello*, 128 F. 2d 172.

Prior to 1934 banks organized or operating under federal law were protected against embezzlement and like offenses by R. S.

[1] The term "bank" is defined in § 1 of the Act (12 U. S. C. § 588a) to include "any member bank of the Federal Reserve System, and any bank, banking association, trust company, savings bank, or other banking institution organized or operating under the laws of the United States and any insured bank as defined in subsection (c) of Section 12B, of the Federal Reserve Act, as amended."

5209, 40 Stat. 972, 12 U. S. C. § 592. But such crimes as robbery, burglary, and larceny[2] directed against such banks were punishable only under state law. By 1934 great concern had been expressed over interstate operations by gangsters against bank activities with which local authorities were frequently unable to cope. H. Rep. No. 1461, 73d Cong., 2d Sess., p. 2. The Attorney General in response to that concern recommended legislation embracing certain new federal offenses. S. 2841, 73d Cong., 2d Sess. And see 78 Cong. Rec. 5738. Sec. 3 of that bill made it a federal crime to break into or attempt to break into such banks with intent to commit "any offense defined by this Act, or any felony under any law of the United States or under any law of the State, District, Territory, or possession" in which the bank was located. Sec. 2 made it an offense to take or attempt to take money or property belonging to or in the possession of such a bank without its consent or with its consent obtained "by any trick, artifice, fraud, or false or fraudulent representation." This bill was reported favorably by the Senate Judiciary Committee (S. Rep. No. 537, 73d Cong., 2d Sess.) and passed the Senate. 78 Cong. Rec. 5738. The House Judiciary Committee, however, struck out § 2, dealing with larceny, and § 3, dealing with burglary. H. Rep. No. 1461, *supra*, p. 1. And the bill was finally enacted without them. But it retained the robbery provision[3] now contained in the first clause of § 2(a) of the Bank Robbery Act.

In 1937 the Attorney General recommended the enlargement of the Bank Robbery Act "to include larceny and burglary of the banks" protected by it. H. Rep. No. 732, 75th Cong., 1st Sess., p. 1. The fact that the 1934 statute was limited to robbery was said to have produced "some incongruous results"—a "striking instance" of which was the case of a man who stole a large sum from a bank but, who was not guilty of robbery because he did not display force or violence and did not put any one in fear. *Id.*, pp. 1-2. The bill as introduced (H. R. 5900, 75th Cong., 1st Sess., 81 Cong. Rec. 2731) added to § 2 (a) two new clauses—one defining larceny and the other making it a federal offense

[2] To the extent that acts constituting larceny would not also constitute a federal crime under R. S. 5209. See United States v. Northway, 120 U. S. 327, 335.

[3] "Whoever, by force and violence, or by putting in fear, feloniously takes or feloniously attempts to take, from the person or presence of another any property or money or any other thing of value belonging to, or in the care, custody, control, management, or possession of, any bank shall be fined not more than $5,000 or imprisoned not more than twenty years, or both."

to enter or attempt to enter any bank with intent to commit therein "any larceny or other depredation". For reasons not disclosed in the legislative history, the House Judiciary Committee substituted "any felony or larceny" for "any larceny or other depredation". H. Rep. No. 732, *supra*, p. 2. With that change and with an amendment to the larceny clause[4] distinguishing between grand and petit larceny (81 Cong. Rec. 5376-5377), § 2(a) was enacted in its present form.

We disagree with the Circuit Court of Appeals. We do not think that "felony" as used in § 2(a) incorporates state law.

At times it has been inferred from the nature of the problem with which Congress was dealing that the application of a federal statute should be dependent on state law. Examples under federal revenue acts are common. *Douglas* v. *Willcuts*, 296 U. S. 1; *Helvering* v. *Stuart*, 317 U. S. —, and cases cited. But we must generally assume, in the absence of a plain indication to the contrary, that Congress when it enacts a statute is not making the application of the federal act dependent on state law. That assumption is based on the fact that the application of federal legislation is nationwide (*United States* v. *Pelzer*, 312 U. S. 399, 402) and at times on the fact that the federal program would be impaired if state law were to control. *Seaboard Air Line Ry.* v. *Horton*, 233 U. S. 492, 503. When it comes to federal criminal laws such as the present one, there is a consideration in addition to the desirability of uniformity in application which supports the general principle. Since there is no common law offense against the United States (*United States* v. *Hudson*, 7 Cranch 32; *United States* v. *Gradwell*, 243 U. S. 476, 485), the administration of criminal justice under our federal system has rested with the states, except as criminal offenses have been explicitly prescribed by Congress. We should be mindful of that tradition in determining the scope of federal statutes defining offenses which duplicate or build upon state law. In that connection it should be noted that the double jeopardy provision of the Fifth Amendment does not

[4] ". . . wherever shall take and carry away, with intent to steal or purloin, any property or money or any other thing of value exceeding $50 belonging to, or in the care, custody, control, management, or possession of any bank, shall be fined not more than $5,000 or imprisoned not more than ten years, or both; or whoever shall take and carry away, with intent to steal or purloin, any property or money or any other thing of value not exceeding $50 belonging to, or in the care, custody, control, management, or possession of any bank, shall be fined not more than $1,000 or imprisoned not more than one year, or both."

stand as a bar to federal prosecution though a state conviction based on the same acts has already been obtained. See *United States* v. *Lanza*, 260 U. S. 377; *Hebert* v. *Louisiana*, 272 U. S. 312. That consideration gives additional weight to the view that where Congress is creating offenses which duplicate or build upon state law, courts should be reluctant to expand the defined offenses beyond the clear requirements of the terms of the statute.

There is no plain indication in the legislative history of § 2(a) that Congress used "felony" in a sense sufficiently broad to include state offenses. Though the legislative data are meager, the indications are to the contrary. In the first place, the 1934 bill expressly provided, as we have noted, that state felonies were included in the definition of the new federal offense of burglary. That provision was stricken in the House. The 1934 bill also defined larceny to include larceny by trick or fraud. That provision was likewise eliminated in the House. The 1934 Act was passed without either of them. The 1937 bill did not renew the earlier proposals to include them but substituted "any larceny or other depredation". Larceny, like robbery, is defined in § 2(a). And "depredation" is not devoid of meaning in such a setting (cf. *Deal* v. *United States*, 274 U. S. 277, 283) apart from any special significance which it may have in local law. It is difficult to conclude in the face of this history that Congress having rejected in 1934 an express provision making state felonies federal offenses reversed itself in 1937 and through the phrase "any felony or larceny" adopted the penal provisions of forty-eight states with respect to acts committed in national or insured banks. It is likewise difficult to believe that Congress through the same clause adopted by indirection in 1937 much of the fraud provision which it rejected in 1934. Cf. *United States* v. *Patton*, 120 F. 2d 73.

In the second place, Congress defined in § 2(a) robbery, burglary, and larceny but not felony. We can hardly believe that having defined three federal offenses, it went on in the same section to import by implication a miscellaneous group of state crimes as the definition of the fourth federal offense. In this connection it should be noted that when Congress has desired to incorporate state laws in other federal penal statutes, it has done so by specific reference or adoption.[5] The omission of any such

[5] See *e. g.*, Act of March 4, 1909, 35 Stat. 1137, 49 Stat. 380, 18 U. S. C. § 392; Act of May 18, 1934, 48 Stat. 782, 18 U. S. C. § 408e; Act of June 11, 1932, 47 Stat. 301, 18 U. S. C. § 420a; Act of February 22, 1935, 49 Stat. 21, 15 U. S. C. § 715b; Act of June 25, 1936, 49 Stat. 1928, 27 U. S. C. § 223.

662a

provision in this Act is a strong indication that it had no such purpose here. Cf. *United States* v. *Coppersmith*, 4 Fed. 198, 207. The Act extends protection to hundreds of banks located in every state. If state laws are incorporated in § 2(a), Congress has gone far toward putting these banks on a basis somewhat equivalent to "lands reserved or acquired for the use of the United States" as described in § 272 of the Criminal Code, 18 U. S. C. § 451. In such a case all violations of penal laws of the state within which the lands are located become federal offenses. Criminal Code § 289, 18 U. S. C. § 468. Such an expansion of federal criminal jurisdiction should hardly be left to implication and conjecture.

Moreover, the difficulty of giving "felony" in § 2(a) a state law meaning is emphasized when we turn to the law of such a state as New Jersey. There we find crimes classified as "misdemeanors" and "high misdemeanors". Rev. Stat. (1937) § 2:103-5, § 2:103-6. *See United States* v. *Slufzky*, 79 F. 2d 504, 505. Uttering a promissory note with a forged endorsement is a "high misdemeanor". Rev. Stat. (1937) § 2:132-1b. The inference is strong that if Congress had designed § 2(a) to include the more serious state offenses committed in or against national or insured banks or only such state offenses as affected those banks (*Hudspeth* v. *Melville*, *supra*, p. 376), it would have used language which would have afforded that protection in all the states.

Finally, the inclusion of state crimes in the word "felony" neither comports with the scheme of the Act nor is necessary to give the Act meaning and vitality. As we have noted, the purpose of the 1934 Act was to supplement local law enforcement in certain respects. And the 1937 amendments were designed "to include larceny and burglary of the banks protected by this statute." H. Rep. No. 732, *supra*, p. 1. But there is not the slightest indication that the interstate activities of gangsters against national and insured banks had broken down or rendered ineffective enforcement of state laws covering all sorts of felonies. On the contrary the bill introduced in 1937 was much more selective and revealed no purpose to make a comprehensive classification of all crimes against the banks. Moreover, the run of state felonies—forgery, rape, adultery, and the like—would seem to have little or no relevancy to the need for protection of banks against the wholesale activities of the gangsters of that day. A related objection could of course be made if "felony" as used

in § 2(a) were taken to mean any federal felony so as to bring within the scope of the Bank Robbery Act miscellaneous federal felonies ranging from the sale of narcotics to white slave traffic.[6] But as indicated by Judge Frank in his dissenting opinion below, § 2(a) is not deprived of vitality if it is interpreted to exclude state felonies, and to include only those federal felonies which affect the banks[7] protected by the Act. That is in our opinion the correct construction.

Reversed.

A true copy.

Test:

Clerk, Supreme Court, U. S.

---

[6] It has frequently been held that when a federal statute uses a term which it does not define but which was a common law offense, it will be given its common law meaning. United States v. Palmer, 3 Wheat. 610, 630; United States v. Smith, 5 Wheat. 153, 160; Harriman v. United States, 163 U. S. 140, 142. In this case, however, Congress has not punished an offense by its common law name. Moreover, at common law murder, manslaughter, arson, burglary, robbery, rape, sodomy, mayhem and larceny were felonies. Wharton, Criminal Law (12th ed.), § 26. And see Bannon v. United States, 156 U. S. 464, 468. Since those miscellaneous crimes as a group do not suggest on their face that they constitute an appropriate base on which to build a federal criminal code for protection of national and insured banks, we will not readily infer that Congress used the word "felony" in its common law meaning. That conclusion is fortified by the further circumstance that Congress has defined numerous offenses in other federal penal statutes and has classified such offenses as felonies or misdemeanors according to the severity of the punishment. Criminal Code § 335, 18 U. S. C. § 541. Hence we need not look elsewhere for the meaning of the term. Cf. Reagan v. United States, 157 U. S. 301, 303. As stated in Adams v. McClung, 317 U. S. —, n. 2, the term "felony" is a "semantic survival which has been emptied of its historic content." Thus we conclude that the word "felony" as used in § 2(a) takes its meaning from federal statutes rather than from the common law.

Forgery at common law was a misdemeanor. Wharton, *supra*, § 861.

[7] One such instance would be violation of the National Stolen Property Act, 48 Stat. 794, 53 Stat. 1178, 18 U. S. C. § 413, especially 18 U. S. C. § 416.